



“The Interrelation Between European Law and Intra-EU Bilateral Investment Treaties: In Quest for the Perfect Equilibrium”

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Alternative Dispute Resolution and Energy Law, the International Hellenic University.

This thesis derives its academic inspiration from the intriguing interplay between Intra-EU Bilateral Investment Treaties(intra-EU BITs) and the EU Law, generating many fascinating implications. The European Commission's Decision on June 2015, to initiating infringement proceedings against five Member States, requesting them to terminate intra-EU bilateral investment treaties between them, has stirred the heated debate with regards the position of intra-EU BITs with the EU legal order

In my dissertation, I decided to deal with some of the fundamental academic questions arising in this context. The multidimensional juxtaposition of interests where the undebatable need for investment protection under a BIT scheme clashes with fundamental aspects of the *acquis communautaire* as well as the status of EU Law and the extent of its intervention in the area of Intra EU BITs, will, as inherent features of this interplay, be extensively examined in this thesis. Furthermore, the issue of compliance with intra-EU arbitral awards through the prism of EU State Aid rules, as well as the future of the energy Charter Treaty will be also analyzed.

I would like to express my sincere appreciation and gratitude to my academic supervisor Pr. Friedrich Rosenfeld, who generously provided significant help and guidance to complete this thesis.

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This dissertation is dedicated to my beloved family and particularly to my grandfather who's presence accompanied always my journey towards becoming a "real scientist".

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CHAPTER 1.

INTRODUCTION

The very character of foreign investment, as one of the necessary “ingredients” for achieving economic wealth, prosperity and welfare in a liberalized economy, constitutes also the fundamental rationale and the “driving force” behind the establishment of a robust regulatory and, more importantly, protective framework, to surround Foreign Direct Investment (FDI). As the synonym for significant economic growth and development through valuable injections of essential financial resources, technological advancement, amelioration of practices and infrastructure, and enhancement of competitiveness, are some of the most “cherished gifts” that FDI “brings” to the recipient states. The benefits are reciprocal; in this sense, the capital-exporting country also derives significant advantages from the stimulation and promotion of foreign Investments, particularly via the internationalization of local businesses and their penetration in new markets which strengthens their external impetus and competitiveness worldwide. In addition, outward FDI contributes significantly also to the economic development of the capital-exporting state particularly through the repatriation of profits generated from foreign activity as well as through the creation of a dynamic and efficient exports sector.

The “genesis” of the international investment law has manifestly injected a considerable impetus to the to the “global” aspiration, to establish a concrete and stable legal but also economic environment for FDI, capable to “insulate” cross-border investments from political risks and relative “threats” to which foreign investors are usually subjected as entering the “terra-incognita”, namely the territory of the host-State. While investment efficiency considerations continue to remain the key determinants driving FDI as an economic activity, investment decisions nowadays are constantly even more influenced, also by the ability of the host-State to provide for an amalgam of safeguards and guarantees, expanding far from the traditional economic-centric momentum they used to have. Particularly, an easily accessible, well-regulated, stable, secure climate and generally an investor-friendly institutional regime, efficiently surrounding and complementing an economically attractive environment, constitutes a significant tool for stimulating FDI and maximizing the benefits such activity entails. In this sense, a legally certain, credible and comprehensive framework of protection is the condition sine qua non for the attraction and encouragement of cross-border investments.

Despite its obvious and uncontested importance for the development and the enhancement of international economic relations and the significant impetus they “inject” in the economic environment of the host-State, cross-border investment, suffers from regulatory fragmentation. Any attempts, although inspired, to subject international investments to an encompassing multilateral legal framework, seem to have failed¹. At the nucleus of this continuing fragmentation stands the gross divergence of interests between the involved players in this risky and expensive “game” called FDI, that cannot be easily reconciled to eventually allow the adoption of a supranational, truly internationalized framework, comprehensive but also flexible enough to effectively regulate FDI in a universal manner.

Albeit the absence of a multilateral instrument on the protection and promotion of cross-border investments, the field of FDI could be nevertheless seen as being regulated by a dense “patchwork” of various types of agreements. Central position in this “mosaic” of regulatory instruments, hold the Bilateral Investment Treaties for the promotion, protection and, in some cases, liberalization of cross-border investments².

Bilateral Investment Treaties (BITs) have always been regarded as ultimate “facilitators” of international investment and the ‘keys’ to “unlock” economic growth and the. Their general purpose is to safeguard investments made in the territory of the Contracting States via the provision of an extensive platform of substantive and procedural rights to the investor’s disposal. The most typical substantive standards of protection provided under a BIT, are guarantees of National (NT) and of Most Favored Nation (MFN) treatment but as well of appropriate compensation in the event of expropriation, commitments on the Fair and Equitable Treatment (FET) and of full protection and security of the investment, undertakings on the observance by the State of the investor’s legitimate expectations, State promises to abstain from the adoption of discriminatory measures, and several kinds of assurances on capital movements and payments. However, the most central and unique feature encompassed in the protective framework of a BITs, is the attribution to the investor of a direct right to bring claims on an alleged breach of his substantive rights by the State, in front of an alternative, binding, and sector-specific adjudicatory forum, the investor-State Arbitration

Also in the EU area, the investment protection landscape is overwhelmed by such BITs demonstrating an extra- but also an intra–EU dimension. In fact, the conclusion of

¹ See in this respect, the Multilateral Agreement on Investment (MAI) negotiated in the framework of OECD between 1995 and 1998.

² Eilmansberger T., *Bilateral Investment Treaties and EU Law*, 46 COMMON MKTL.REV383 (2009), p.384.

such legal instruments, between EU Member States inter se and vis-à-vis third State, could be well characterized as prolific. The numbers speak on their own: According to the features provided by the Commission, around 200 intra-EU BITs and 1200 extra-EU BITs exist within the EU legal order³. The proportions are that interesting also regarding the cases of investment disputes submitted to arbitration under intra-EU BITs. The numbers correspond to the 70 per cent and 20 per cent of the International Center for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) case load⁴.

Concentrating further on the intra-EU BITs, the majority of them have been concluded as a Pre-Extra-EU BITs between “old” EU Member States and States that had not yet acceded to the EU at the time of the conclusion. As a result of the EU enlargements, these agreements were “inherited” within the EU legal order and transformed to intra-EU BITs.

A. THE ANATOMY OF THE LEGAL PROBLEM

Characterized as an “anomaly within the EU internal market”⁵, intra-EU BITs and their status, especially after the last EU enlargements but also under the post-Lisbon competence-balances in the area of EU Common Commercial Policy, have become the “bone of contention” between the EU Commission and those Member States wishing to leave their intra-EU BITs untouched by the Commission’s “fire”.

On June 2015, the European Commission decided to initiate infringement proceedings against five Member States, namely Austria, the Netherlands, Romania, Slovakia and Sweden, requesting them to terminate their intra-EU BITs⁶. According to the Commissions perspective: “these BITs are out of date inside a single market of 28 countries...In particular, intra-EU BITs fragment the single market by conferring rights to some EU investors on a bilateral basis. Their provisions overlap and conflict with EU single market law on cross-border investments... The problem with BITs is not theoretical and has very practical consequences. For instance, one recent arbitration proceeding based on an intra-EU BIT has produced an outcome that the Commission

³ See, EU Commission Staff Working Document on Capital Movements and Investments in the EU: Commission Services’ paper on Market Monitoring, SWD (2012) 6 final, 13.

⁴ See, Yotova R., *The new EU competence in foreign direct investment and intra-EU investment treaties: Does the emperor have new clothes?*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW, Freya Baetens ed. (2013), p.388.

⁵ See EU Commission’s Submissions to the Eureko arbitral Tribunal, July 2010, *Eureko v Czech Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, 177 at <<http://ita.law.uvic.ca/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf>>

⁶ See http://europa.eu/rapid/press-release_IP-15-5198_en.htm.

considers incompatible with EU law, as the arbitral award constitutes illegal state aid⁷. This situation may create legal uncertainty for cross-border investors, - at a time when the EU's top priority is to promote an environment that encourages investment”.

This statement seems to encapsulate all the major EU concerns around the continuing validity and applicability of intra-EU BITs that seem to have been elaborated into a completely autonomous investment protective system, operating in parallel with the EU provisions on investment protection. But is this “co-habitation” really problematic?

Seen from an different angle, given the textual but also contextual structure of the Treaty of the Functioning of the European Union (TFEU) provisions on the freedom of establishment and freedom of capital flows, it could indeed be validly argued that TFEU is in fact dealing with cross-border investment between EU Member States. However, it is doing that in an obiter, rather incidental than systematic, concentrated and targeted manner, merely as one of the numerous other commercial sectors that could fall under such a vague and open-ended regulatory scope of the internal market provisions. Hence, a question arises, on whether the EU framework on internal market and the fundamental EU freedoms as the bedrocks upon which the envisagement of a fully liberalized market was effectuated, suffice in effectiveness and comprehension so as to subrogate intra-EU BITs and constitute henceforth the only applicable framework of protection when it comes to intra-EU FDI. The answer to this question, affirmative or negative, entails significant implications, especially with regards to the intra-EU investors and their legitimate expectation towards a stable and secured legal framework to surround and safeguard their investment.

Admittedly, an attempt to engage in a thorough examination of the intra-EU BITs phenomenon within the context of and in interrelation with EU Law, and to address whether it really threatens to erode the solid foundations of the integrated EU CCP framework, is deemed to fall if isolated from clarifying their status within the landscape of intra-EU investment protection, the purposes underlying their operation as well as the nature and the necessity of the substantive standards of protection they contain. All these intrinsic issues will be analyzed in this thesis, which will furthermore examine two of the most practically important aspects of the interplay between intra-EU BITs and EU Law, namely the interaction of inter se IIA's and intra-EU arbitral awards with the EU State Aid rules and the future of the Energy Charter Treaty (ECT) as a multilateral IIA demonstrating, inter alia, also an intra-EU dimension.

⁷ The Commission quotes here the *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. (Micula) v. Romania*, ICSID Case No. ARB/05/20, available at: <http://www.italaw.com/cases/697#sthash.IEElewOt.dpuf>

B. THE EASTERN SUGAR v. CZECH REPUBLIC ARBITRATION CASE

Once upon a time, specifically on March 27, 2007 an arbitral tribunal, constituted under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, issued a partial award in the matter of an ad hoc arbitration between Eastern Sugar B. V. (Netherlands) v. Czech Republic based on a BIT between Netherlands and the Czech Republic (*Eastern Sugar*). And although this little “storytelling” might seem as the beginning of another interesting arbitration “fairytale”, this is not the case with *Eastern Sugar*. This case, the first that engaged in a principled discussion of the interplay between intra-EU BITs and the EU Law, has opened the Pandora’s box regarding the “survival” of intra-EU BITs as norm of international investment law, within the EU legal order.

According to the Respondents position, if those treaties survived after the Czech Republic’s accession to the EU instead of being terminated (as Czech Republic suggested), this might distort the EU law principle of equality of treatment. Similarly, a simultaneous application of the BIT and the intra-EU investment regime would breach the principle of non-discrimination enshrined in Article 18 TFEU, and the principle of mutual trust⁸. With regards to the arbitration clause incorporated in concerned BIT, Czech Republic submitted that with regards to issues relating to EU Law, the ECJ’s exclusive jurisdiction leaves no room for international arbitration in this area. Finally, the tribunal, upheld the validity and applicability of the intra-EU BIT (including the arbitration clause contained therein) from the prism of international but also of EU Law. And somewhere between international and EU Law considerations, this interesting “journey” towards eventually “drawing the picture” of the conceptual and practical interplay between intra-EU BITs and the EU Law, begins...

⁸ Burgstaller M., *European Law and Investment Treaties*, 26(2) J.INT.L ARB. 181 (2009), p.184.

CHAPTER 2

DEVELOPMENTS IN THE EU INVESTMENT LAW LYING AT THE HEART OF A POLICY SHIFT: DOES LISBON DIRECTLY AFFECT THE STATUS OF INTRA-EU BITS?

The advent of the Treaty of the Lisbon in 2009, an institutional reformer and a policy transformer that substantially redefined the scope of Common Commercial Policy (CCP) framework, effectuated significant alterations particularly in the land scape of EU investment policy area. EU has literally waken up in a significantly differentiated scene, where the balance of powers between the institutional center of EU and its periphery, i.e. the Member States, was revisited to eventually to lead to a significant transition in the allocation of competences.

Under the former regime, EU enjoyed not exclusive but shared competence in the area of international investment. Notable practices exemplifying the exercise of powers in the cross-border investment field in a shared “modus” are, on the one hand the prolific conclusion of BIT between EU Member States and third countries, some of which accessed the EU under the recent EU enlargements (a fact that essentially entailed the transformation of these pre-extra-EU BITs to intra-EU BITs and, as such, into the bone of contention between the Commission and concerned Member States), and the development of the 2006 Minimum Platform on Investment for EU Free Trade Agreements (MPol) by the EU on the other hand, as an outline of basic standards regulating market access and the potential basis for the realization of the EU envisagement to create a fully-fledged, should policy to surround FDI.

Under the post-Lisbon regime and by virtue of Article 207 TFEU, EU is empowered with exclusive external competence in the field of international investment, as FDI is incorporated into the EU CCP framework⁹. This substantial extension of competences includes also the exclusive competence of the EU to negotiate and conclude international investment agreements with third (non-EU) countries such as bilateral investment treaties (BITs).

⁹ and thus, pursuant to Article 3 TFEU, falls under the exclusive regulatory competence of the EU.

A. DOES EU EXCLUSIVE FDI COMPETENCE ENCOMPASSE ALSO INTRA EU INVESTMENT ACTIVITY, PURSUANT TO ARTICLE 207 TFEU?

Article 207 TFEU constitutes the provision that explicitly confers a new exclusive competence to the EU to regulate FDI¹⁰. However, although it locates FDI under the umbrella of the CCP, it fails to define the notion's conceptual scope. Hence, the objective dimensions of the new EU competence seem rather opaque since no clear delimitations are provided to elucidate the precise width of those new powers.

The absence of a clear definition and the breath of specific clarifications on what exactly falls under the scope of FDI could be relevant also in the context of intra-EU BITs. In the *Eastern Sugar* case, the Commission, via a letter of the DG Internal Market quoted by the tribunal, seemed to consider intra-EU investment a matter falling under its exclusive competence by denying intra-EU BITs applicability on relating matters:

“For facts occurring after accession, the BIT is not applicable in matter falling under the Community competence. Only residual matters, such as diplomatic representation, expropriation and eventually investment promotion would appear to remain in question.”¹¹

This stance of the Commission generates a number of questions. If the EU exclusive competences under the post Lisbon CCP regime encompass also intra EU BITs, could this competence shift hold the answer to eventually resolve the legal conundrum of intra-EU validity and applicability? Could the Commission's argument that under the post Lisbon status quo in the division of powers within EU, issues relating to international investment are considered subjects falling under its exclusive competence¹², in fact affect the life expectancy of intra-EU BITs as they stand? An answer to these question of competences could elucidate the real dimensions of the EU Law and intra-EU BITs interplay and in particular, whether there is a real conflict of norms or whether this conceived collusion is a mere interpretative one.

¹⁰ Indeed, Article 207(1) of the TFEU states explicitly that CCP includes trade in goods, in services, in trade-related aspects of intellectual property and in FDI. Also, Article 206 of the TFEU highlights that ‘the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on FDI’.

¹¹ EC Letter of 13 January 2006, quoted in the *Eastern Sugar v. Czech Republic*, para 119.

¹² In the same lines the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European Investment Policy, 7.7 2010, COM (2010) 343 final (Commission Communication on Investment) and the Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, on the new Article 207 TFEU.

First of all, the letter of Lisbon Treaty and further, the text of Article 207 TFEU remain silent on the issue and do not locate intra EU FDI under its normative scope. Could anyone validly argue the opposite?

It flows from a systematic interpretation, that the inclusion of Articles 206 and 207 TFEU in the Chapter 5 of the TFEU, which deals exclusively with the Union's external actions, indicates that the EU legislator intended to restrict the provisions application to external affairs. This argument is enhanced also by the fact that CCP framework, under which FDI is located, constitutes part of the Union's action on the international scene and of the main pillars of the European Union's relations with the rest of the world. Therefore, from that point of view, its regulatory width seems to not extend to intra-EU FDI but merely surrounds investment relations vis-a-vis third countries.

Further, an attempt to locate intra-EU BITs under the normative umbrella of CCP exclusive competence of the EU by contesting that in the absence of clear delimitations *rationes materiae*, intra-EU FDI could be construed as an implied power of the EU, seems an over-stretching approach.

Moreover, according to Article 207 TFEU, the introduction of those new rules on the allocation of competences in the area of CCP does not otherwise affect "the delimitation of competences between the Union and the Member States"; thus it does not interrupt the existing balance of competences between the EU and Member States for example in areas of shared powers such as the internal market regulation, in which the allocation of competences as remains undisturbed. From the EU perspective, and according to the Commission's interpretative communications in the area of intra-EU investment, intra-EU FDI and, consequently, intra-EU BITs, constitute issues of internal affairs. As such, they fall basically under the regulatory space of Articles 49 and 63 TFEU incorporating the fundamental freedoms of establishment and of capital flow respectively. These provisions, the conceptual nucleus of internal market, essentially constitute the only relevant -if not the only available *stricto sensu*- source of primary law and the most -at least potentially- comparable provisions to those of BITs, to be found within the legislative corpus of EU Law. In this context, intra-EU FDI is conceived as forming, *rationes materiae*, a part, another piece in the "jigsaw" of the internal market, which constitutes an area of shared competences between the EU and its periphery, the Member States.

In principle, and according to Article 2 TFEU, which stipulates the rules of vertical allocation of competences within the EU, the ability of Member States to exercise their regulatory powers in an area of shared competence is inextricably linked to and depending upon the extent to which the EU has already and exhaustively exercised its powers in the respective field. In the area of intra-EU FDI, the EU has not attempted to

regulate, by adopting any legislative acts such as secondary legislation or international agreements but only with non-binding instruments such as notes and communications¹³.

In this context, of particular significance is the fact that, while the EU legislator considered it necessary to explicitly regulate extra-EU FDI¹⁴, he has omitted to somehow clarify also the status of intra-EU FDI even when presented with an optimal negotiation opportunity in the context of the reforms introduced by the Lisbon Treaty. In another crucial circumstance, i.e. the conclusion of accession agreements by the EU with “new” Member States, the EU legislator again remained silent on the issue of intra-EU FDI and particularly on the status of intra-EU BITs.

In the absence of any concrete EU attempt to exercise its shared competence in the field of Internal Market and specifically and regulate and safeguard in a comprehensive and effective manner analogous to that through which intra-EU BITs encourage and protect FDI, it can be concluded that the member states have legitimately adopt legally binding treaties such as the intra-EU BITs in the field of intra-EU FDI in exercising of their shared competence with the EU, to the extent that this does not contravene the fundamental Treaty freedoms.

B. CONCLUDING REMARKS

The substantial extension of competences under the post Lisbon regime was born out of the wish to develop a concrete and robust framework to surround the EU investment policy. Moreover, it clearly reflects the constantly increasing ambition of the EU to enhance its role and effectively involve in the elaboration of international investment law norms within and without its territory.

Possibly, this policy shift could provide also an effective solution to this “quiz” regarding the status of intra-EU BITs, which have for long constituted the legal bedrocks of inward EU investment protection system. Instead, intra-EU BITs are not encompassed within the normative framework of article 207, thus they remain a matter of shared competence. As such, they were validly concluded and at least from an EU perspective, remain effective until their termination according to the respective rules on termination of international treaties. The event of accession of one of the signatories States in the EU, except from the following transformation of those BITs from extra to

¹³ Yotova R., The new EU competence in foreign direct investment and intra-EU investment treaties: Does the emperor have new clothes?, in *INVESTMENT LAW WITHIN INTERNATIONAL LAW*, Freya Baetens ed. (2013), pp. 392-398.

¹⁴ See *supra*, note 13.

intra-EU agreements, a merely technical differentiation to their “profile” as international investment norms, does not entail any other direct substantive implications with regards to their legal status, validity and applicability. This is because accession to the EU as a legal act, does not suffices per se and ipso facto to trigger their automatic termination, suspension or supersession by the EU Law since such consequence is not envisaged neither in the TFEU or the Accession Agreements, nor in the concerned BITs.

CHAPTER 3.

INTRA-EU BITS AND THE EU LAW: THE EU PERSPECTIVE

The perceived collision between those two competing legal systems, the intra-EU BITS and the EU Law as an autonomous legal order, does not occur in a legal vacuum but rather in an environment where EU Law is particularly relevant. The following chapter addresses the status of intra-EU BITS through the prism of some EU considerations concentrating on the EU Law primacy and its reflective effects on the continuing validity and applicability of pre-accession international agreements, as the intra-EUBITS are.

A. ARTICLE'S 351 TFEU RELEVANCE IN THE CONTEXT OF INTRA-EU BITS

From an EU perspective, Article 351 TFEU constitutes perhaps the only provision within the corpus of EU Law that could potentially clarify the status of the intra-EU BITS and resolve the legal conundrum of their applicability as norms of international investment law, “inherited” into the EU legal order by virtue of the respective Member States accession to the EU¹⁵.

The article, enshrining the principle of “*pacta sunt servanda*”, explicitly affirms the obligation of Member States to respect and fulfil their international obligations constituted before the entry into force of the TFEU or, in case of acceding States, before the date of their accession. It clearly intends to the suspension of the principle of EU Law primacy and to the prioritization of any prior concluded international agreements. The ultimate rational underpinning Article 351TFEU is to grandfather such agreements, as creatures of international law, and to safeguard their validity and applicability, however not unconditionally, but to the extent that their preservation as legal norms does not clash with the integrity and unity of the EU legal order . In this context, a material incompatibility or contradiction with the EU law and its cornerstone principles could bring such agreements under the dissecting “Communal microscope” and activate Article 351(2) TFEU.

Under Article 351(2) TFEU, the doctrine of primacy of the EU law is reactivated to serve this time as conflict of law rule and “orient” this compatibility assessment. In case

¹⁵ Eilmansberger T., *Bilateral Investment Treaties and EU Law*, 46 COMMON MKTL.REV383 (2009), p. 421.

where the pertinent international legal norm is found in a material or even teleological collision with the EU Law, Article 351(2) TFEU introduces an amendment obligation, namely requesting the prompt elimination of any divergences found in the scope of such international agreements that directly and irreconcilably threaten EU Law's consistency and its uniform application. Even in such case, though subject to the necessary adjustments, these agreements remain valid and effective.

In the *Eastern Sugar* and the *Eureko*¹⁶ case the Commission suggested the inapplicability, in the intra-EU BITs context, of the Article 351 TFEU, the ultimate guardian of the validity and priority of any international agreements within the EU Legal order. According to EU jurisprudence, and under a rather restrictive interpretation, Article 351 TFEU is conceived as affording protection only to anterior international agreements concluded between an EU Member State and a third State. Specifically, in the *Commission v Italy* case, the Commission stated that "in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of the GATT¹⁷".

According to this line of strictly grammatical and rather systolic interpretation, the Article's application in the context of anterior intra-EU international agreements seems to be excluded because, Member States are considered to have, by deference to the EU Law's primacy as the supreme rule law within the EU legal order, voluntarily relinquished at the occasion of their accession to the EU, any substantive rights deriving from international agreements concluded in an intra-EU modus, i.e. between EU Member States¹⁸.

However, even, if the letter of Article 351 leaves no space for expanding its applicability also in anterior *inter se* international agreements, under the following perspective, the doctrine of EU Law, seems to nevertheless penetrate within the area of pre-accession intra-EU agreements under the same methodological constellation followed by the 351(2) TFEU. Principally, EU does not preclude Member States from concluding *inter se* international agreements particularly in fields not or partially covered by EU Law, however not unconditionally, but rather on the premise that they are compatible with the EU Law.

Hence, international agreements are superseded by EU Law not automatically, in an unreserved, unqualified and thus, unorthodox manner provided for the doctrines

¹⁶ *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).

¹⁷ Judgement in the *European Economic Commission v The Italian Republic*, 10/61, EU:C:1962:2.

¹⁸ Eilmansberger T., *Bilateral Investment Treaties and EU Law*, 46 COMMON MKTL.REV383 (2009), p. 422.

generally accepted character as a conflict of laws rule, but rather, only where conflict arises vis-à-vis provisions of primary or secondary EU Law¹⁹. It would be an oversimplistic approach and an arbitrary generalization to assume *a priori* precedence of the EU Law over pre-accession agreements between Member States only by virtue of the event of accession to the EU, in an absolute manner, without any further qualification with regards to their compatibility with the EU Law. In the same line Soderlund who argues that intra-EU international agreements will not automatically be affected by the mere operation of the act of accession; instead it will be the obligation of the acceding state, as stipulated in the pertinent association agreement, to actively take appropriate steps to remove incompatibilities which may exist between the terms of the international treaty and the dictates of EC law²⁰.

Hence, the “compatibility” test is also central in the intra-EU international agreements area. Under the broad *Burgoa* constellation, incompatibility shall be assessed based on whether the agreement at stake constitutes an obstacle in the effective application of the EU Law and generally the attainment of the Union’s objectives²¹. The same parameter shall also apply to intra-EU international agreements, because where incompatibility is absent, to assume an *a priori* inapplicability of an international agreement, especially in the context of intra-EU BITs, is an over-inclusive approach that imposes an disproportionate burden upon the beneficiaries, now unreasonably deprived of substantive rights they previously enjoyed. The conceptual test of “incompatibility with the EU” enshrined in Article 351(2), is therefore, also relevant and shall be deemed applicable by analogy also in the context of *inter se* international agreements as the only criterion that could legitimately lead to the elimination or the imposition of any limitations on the validity and applicability of an diverging *inter se* regime, by virtue of EU supremacy doctrine.

B. THE EU LAW PRIMACY ARGUMENT

At the nucleus of the alleged conflict of norms between the intra-EU BITs regime and the EU Law, as the central EU argument that essentially concentrates the substance of this legal *problematique* surrounding the survival or the eventual extinction of these

¹⁹ Dimopoulos A., *The Validity and Applicability of International Investment Agreements Between EU Member States Under EU and International Law*, 48 COMMONMKTL.R EV 63 (2011).

²⁰ Soderlund C., *Intra-EU BIT Investment Protection and the EC Treaty*, 24(5) J.INTL.ARB 455(2007).

²¹ Case 812/79, Judgment of the Court of 14 October 1980, Attorney General v Juan C. Burgoa.

interesting legal animals, the intra-EU BITs, lies the argument of the primacy of the EU Law.

The establishment of the doctrine of primacy or supremacy of the EU Law, as a product of the ECJ's jurisprudence, could be illustrated as one of the landmark points of European integration. In the *Costa v ENEL* case, the ECJ enunciated the principle as a maturation of its *Van Gen den Loos* judgement on the EU Law's direct effect and a clearest manifestation of its implications. The doctrine conceptualizes and institutionalizes the prevalence accorded to the EU Law vis-à-vis conflicting national law norms. Further, it reflects and emphasizes the prioritized status of the EU Law within the EU legal order as the overriding rule of Law consolidating those overarching "europeanized" values and objectives within the EU legal order that shall supersede those of purely domestic but also international origin.

The doctrine of supremacy of the EU Law was invoked by the Commission in the *Eastern Sugar* and in the *Eureko* cases (in the forms of a letter of the DG Internal Market and as part of the Commissions Observations respectively), as truly encapsulating the EU perspective towards the status of the intra-EU BITs. Particularly, and according to the Commission, the doctrine of primacy of the EU Law, conceived and understood also as a "made in the EU" conflict of law rule penetrates also in the area of international agreements concluded prior to accession of the concerned Member States, and entails the inapplicability of the those BIT, where in collision with the primary and secondary EU Law. The Commission enhanced its argument on the precedence of EU Law over the BIT provisions by its submission in the *Eureko* case stating:

"As a result of the primacy of the EU law vis-à-vis pre-accession treaties between Member States, conflicts between BIT provisions and EU law cannot be resolved by interpreting and applying the relevant EU law provisions in the light of the BIT. Only the reverse approach is possible, namely interpretation of the BIT norms in the light of EU law."²²

Under this EU perspective, EU Law is conceived by the Commission as the "key" that will eventually "unlock" or to "double-lock" the applicability of the intra-EU BITs. In a hierarchically structured, multileveled legal order, as the EU legal order is, and in circumstances of pluralism of legal norms, the EU Law, by virtue of its primacy, is understood as the superior legal norm that prevails over and supersedes conflicting national and even international legal structures, and as the ultimate adjudicator of the

²² *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).

status of the intra-EU BITs, the arbitrator to decide on their applicability. In this respect, it states in its amicus curiae brief in the *Eureko* case that “in the EU legal order...neither the BIT as such nor the conflicting provisions become “invalid”; but they cannot be applied where they conflict with EU law²³”. It follows, that from an EU perspective and by virtue of the primacy doctrine as a conflict of law rule, the intra-EU BITs per se or their relevant provisions may lose their applicability only when they clash with the EU Law structure²⁴.

Therefore, following the structure of this syllogism and accepting the doctrine of primacy as a conflict of law rule, one must firstly decide on whether there is an incompatibility between the concerned anterior Treaty and the EU Law, because then and only then the doctrine of EU Law primacy as a conflict rule has a reason to be activated. In this context, the relevance (in the intra-EU BITs area) of Article 351(2) TFEU constellation, inserting the indispensable criterion of “incompatibility with the EU Law” as the premise upon which the hierarchical subordination of anterior international agreements may only be permitted, shall be revisited.

C. THE SCENARIO OF INAPPLICABILITY AND TERMINATION OF AN INTRA-EU BIT PURSUANT TO THE INCOMPATIBILITY TEST AND THE HYPOTHETICAL INCOMPATIBILITY CONSTELLATION

Where an incompatibility between an inter se international agreement and EU Law emerges, compliance with the doctrine of EU Law primacy requests the adoption of all the necessary measures by the Member State to ensure the elimination of the incompatibility. Under this relatively flexible structure, it can be inferred that as a matter of principle, the existence of an incompatibility does not per se produce any legal imperative to phase out the applicability of a prior concluded international agreement, especially where the incompatibility is considered curable e.g. through expansion of the IIA's scope of protection *ratione personae*. Inapplicability, or even denunciation of an incompatible IIA shall be confined to cases where the existence of the incompatibility constitutes a substantial and irremediable threat to the EU legal order and leads to a profound and “incurable” conflict of norms.

²³ *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).

²⁴ Soderlund approaches the same conclusion although from the reversed starting point : “And, as there is no conflict between the substantive provisions of existing intra-EU BITs and the EC Treaty, the primacy of EC law is a moot point to start with.”

Hence, recourse to the termination of an IIA scenario, even accepted as possible by the ECJ²⁵, should be considered as an *ultima ratio*, a solution of last resort, to be used exceptionally and in extreme cases, namely where the contradiction and the collision with the EU Law is so grave, that their survival would profoundly undermine the spirit of EU provisions and where any alternatives including renegotiation or suspension of such agreements are deemed insufficient to resolve the emerged conflict of norms.

This approach founds itself in compliance with the overarching EU objective of international law observance and the ultimate preservation of pre-accession international treaties. Since these agreements were concluded outside the EU environment and under no obligation to observe the EU structures and uncompromising conceptual “red lines”, some divergences and fragmentation must be at least expected. It shall be noted that the purpose of the “incompatibility test” is not to be used as a legal weapon to “extinguish” every single agreement concluded prior accession or competence shift. This would lead to the “disarmament” of Member States regulatory powers particularly in areas of shared competences and eventually lead to an EU regulatory monopoly. Such approach would breach the principle of subsidiarity and the rules in the allocation of competences but also of international doctrines of “*pacta sunt servanda*” and of “*state continuity*”. After all, if that was the Unions genuine intention, the first victims which such a “wipe-off” campaign would have targeted, would be no other but the bilateral tax treaties between Member States which, instead, continue until now their peaceful life within the context -and under the auspices- of internal market, the beating heart of the *aquis communautaire* and EU integration.

In line with the above consideration, the development and application in the ECJ cases by the ECJ of the hypothetical incompatibility test is conceived as a very dangerous conceptual tool in the ECJ’s assessment toolbox to legally purify the transformation of the “incompatibility test” from a balancing constellation to the ultimate “annihilator” of all prior accession international agreements²⁶.

While the general obligation to eliminate conflicts deriving from the interplay between pre-accession agreements and EU Law, on the altar of preserving the integrity and autonomy of the EU legal order and guaranteeing its uniform and effective application, seem acceptable, to stretch out this duty so far as to encompass potential conflicts that have not yet even materialized seems as an approach that completely disregards the purposive foundations of the compatibility criterion, i.e. to balance the

²⁵ Commission v Italy case

²⁶ Commission v Austria Sweden

interplay between the EU Law supremacy doctrine on the one hand and the duty to preserve the status of anterior international agreements on the other .

It is evident, that the ECJ's recourse to such an extreme methodological tool is inextricably linked with its serious concerns regarding its exclusive competence to authoritatively apply and interpret EU Law and the institution of international arbitration as an alternative adjudicatory mechanism. Thus, the Court seems strongly motivated to continue applying the “hypothetical incompatibility” test to any type of pre-accession agreements perceived to cast a threat upon its juridical monopoly, including the intra EU-BITs. Illustrative of such intention is the fact that in its *amicus curiae* brief addressed to the *Eureko* tribunal, the Commission referred to the BITs provisions and particularly to arbitration clauses as resulting in “serious potential for discrimination between EU investors from different Member States, which is incompatible with EU law.”²⁷

However, specifically in the context of infringement proceeding against EU Member States regarding the termination of intra-EU BITs²⁸, any examination of incompatibilities pursuant to the “incompatibility” constellation shall reveal the substantial contradictions between those *ex hypothesi* conflicting norms – if any- and not to transform a material coincidence to an incompatibility serious enough to trigger the BITs termination. This is particularly important in the area of investment protection, where the subsequent termination of a BIT and the elimination of substantive rights deriving from it, based on the simplistic argumentation that one or more of its provision is perceived to illustrate a tension to possibly collide with EU Law, imposes a disproportionate burden upon the Members States as well private actors involved. After all, there is a long distance that conceptually and practically separates legal comparability and substitutability from legal incompatibility.

D. CONCLUDING REMARKS

From the above analysis the following conclusions shall be inferred: From an EU Law perspective, intra-EU BITs are validly concluded by the Member States. Further, merely the accession to the EU or the operation of the EU Law primacy doctrine does not automatically entails the termination or otherwise affects intra-EU BIT's applicability. The potential effect of the EU Law and the fundamental principles underpinning its structure on the legal status of intra-EU BITs depends on the quality,

²⁷ *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).

²⁸ See *supra*, note 6.

the intensity and the reconcilability of the demonstrated incompatibility with the Union's law. "Disarmament" of such agreements by way of rendering them inapplicable, but also by denunciation, shall be requested in the context of compliance with the EU supremacy doctrine only as the ultimate solutions to an otherwise "incurable" conflict of norms.

But even where the divergences between those regimes are irreconcilable, "the effective prevalence of the EU *aquis* does not entail, at the same time the automatic termination of the concerned BITs, or necessarily, the non-application of all their provisions. This was confirmed also under the Commission's letter quoted by the Eastern Sugar arbitral tribunal: "Without prejudice to the primacy of Community law, to terminate such agreements Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves"²⁹.

Therefore, under the EU "lenses", termination of IIA's is a matter falling outside the EU Law ambit. But if not the EU Law, then who will decide on this crucial issue? In this context, the Commission's words may very well be considered to encompass an implicit recognition of the relative international law norms as the only appropriate instruments empowered to determine the impact of EU Law considerations on the status of intra-EU BITs and eventually answer the complex question of their validity and applicability.

From a practical point of view, a mere allegation of existing incompatibilities or even a declaration of EU Law prevalence in the form of non-binding instruments as a Commission's letter, signifies that invocation and application of the intra-EU BIT provisions within the EU legal order may be problematic -if not absolutely impossible- and nothing more. Even if we accept that the EU Law supremacy is that conflict of laws rule "which must be recognized also under international law"³⁰, under which constellation of hierarchy of norms would an arbitral tribunal, deriving its jurisdiction from an *inter se* IIA, will be obliged to adopt this exclusively EU normative architecture as an overarching and overriding rule, the operation of which automatically entails the inapplicability of an international law instrument without any further and binding qualification?

In this sense, the only EU authority competent to assess in a binding manner and pursuant to the relevant EU rules, the compatibility of intra-EU BITs with EU Law is the ECJ and in the absence of a Court's ruling, intra-EU BITs shall be considered as still applicable also from an EU Law perspective. But even in the hypothetical scenario where an ECJ's declaration of intra-EU BITs gross incompatibility with the EU is

²⁹ Eastern Sugar award, para.120

³⁰ See *supra*, note 13, p. 426

present, the “bindingness” of such a ruling vis-à-vis an arbitral tribunal operating principally under the auspices of international law as a supranational judicial forum, constitutionally absolutely detached from EU Law structures and considerations, including judicial precedent and even jurisprudence constante, is seriously questionable. In this sense, to the extent that the *problematique* of inter se IIA’s incompatibility with the EU Law constitutes by nature and by purpose an issue of EU internal affairs, the effect of the EU prevalence over intra-EU BITs i.e. the BITs inapplicability from the prism of the Union’s Law, is in substance, a matter for “internal consumption”, only relevant within the confines of the EU legal order, as it has been also demonstrated by the absolute majority of intra-EU BITs arbitral jurisprudence. However, this approach does not undermine at all, the importance of the legal characterization of the intra-EU BITs as incompatible or inapplicable under the prism of EU Law in the context of intra-EU arbitral awards enforceability within the EU Legal order.

CHAPTER 4.

INTRA-EU BITS STATUS UNDER INTERNATIONAL LAW: THE ARGUMENT OF INTRA-EU BITS TERMINATION PURSUANT TO INTERNATIONAL LAW

Both Intra-EU BITs and EU Law are creatures of law generated in the “laboratories” of international law³¹. Indeed, despite the aspirational words of AG Maduro on the establishment of “a municipal legal order of transnational dimensions”³² and the ECJ’s characterization of EU Law as “a new legal order of international law”, from a public international law perspective, EU Law does not itself create an autonomous and distinct supra-national legal order. Although a highly integrated and structurally sophisticated legal order, demonstrating institutional and constitutional features of a unique “Europeanized federalism”, EU Law remains a subsystem of public international law³³. Hence, its interplay and perceived collision with intra-EU BITs as international law “animals”, shall be evaluated pursuant to general principles and normative constellations of international law³⁴. In this context, the appropriate interpretative tools to elucidate the crucial issue of the impact of EU Law on the intra-EU BITs validity and applicability, particularly when emerged under an intra-EU BIT dispute, are Articles 59 or Article 30 of the VCLT, encompassing the fundamental interpretative norms to resolve conflicts between international law Treaties³⁵³⁶.

A. THE SCENARIO OF DIRECT TERMINATION

Where the conclusion of the intra-EU BIT has preceded, as a legal event, the accession to the EU of both contracting States, the question arises whether and how the accession to the EU affects the validity and applicability of the intra-EU BIT as *inter se* agreement concluded under international law. To answer this question we must firstly address the scenario of direct termination of the intra-EU BITs on the occasion of a Member State accession to the EU.

It appears that Member States have not explicitly express their intention to terminate the existing *inter se* BITs in a formal or informal manner, even when presented with the perfect opportunity to do so i.e. at the events of 2004 and 2007 EU enlargements. Nowhere in the course of the accession negotiations where, traditionally, issues of major incompatibilities between the “merging” legal orders are addressed in order to be eliminated in the near future, but also neither in the Accession Treaties of the new

³¹ (The Easter Sugar arbitral tribunal referred to the TFEU as a regional multilateral treaty elis 175 foot).

³² See supra, note 13.

³³ BURGSTALL UNI 468

³⁴ See supra, note 13 p. 424, also Eureko BV v. The Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).

³⁵ eastern 156 p

³⁶ VCLT leads the interpretative analysis of this complex legal issue premised on the assumption that both of the concerned Member States will be parties to the VCLT. However, even in case when this precondition is not fulfilled, i.e. where one of the parties to the BIT has not ratified the VCLT, the applicability of its provisions shall, nevertheless, be affirmed to the extent they represent customary international law.

Member States reference is made on the thorny issue of intra-EU BITs and their status within the new European landscape.

B. THE SCENARIO OF IMPLICIT TERMINATION

Since the scenario of direct termination of intra-EU BITs shall be abandoned, it must be examined whether intra-EU BITs can be considered as implicitly terminated according to the relevant international law rules. This has been argued in the prominent *Eastern Sugar* and *Eureko* arbitration with regard to the Netherlands- Czech Republic and Dutch-Slovak Republic BITs respectively. At the heart of this argument lie the implied automatic termination of the concerned intra-EU BITs by virtue of Member State's accession to the EU and the subjection of existing investments previously governed by the intra-EU BITs, to the EU Law.

I. THE APPLICABILITY OF ARTICLE 59 VCLT

Article 59 VCLT constitutes the fundamental provision on Treaty conflicts able to penetrate into the core of this legal conundrum on the implicit termination of *inter se* EU BITs and eventually resolve it.

Article 59 VCLT incorporates the principle of *lex posterior*, as an interpretative tool to resolve conceived conflicts between prior and subsequently concluded treaties between the same parties, provided that a) they cover the same subject matter and b) the termination of the earlier treaty either i) reflects the intention of the parties or ii) it is considered necessary due to the gross incompatibilities between the two treaties that render impossible their simultaneous application.

Before examining the substantive requirements of Article 59 VCLT, proper interpretation of the provision shall, encompass reference to distinct legal question of procedural nature and of fundamental importance To the validity and applicability of the intra-EU BITs. Does operation Article 59 VCLT leads to automatic –in procedural terms- termination of intra-EU BITs?

a. THE ARGUMENT OF AUTOMATIC TERMINATION OF INTRA-EU BITS

A common argument invoked by the Respondents also in *Eastern Sugar* and in *Eureko* cases, relate to the implicit automatic termination of the concerned intra-EU BITs pursuant to Article 59 VCLT. However, even if a the textual structure of Article 59 VCLT (particularly the phrase a Treaty shall be considered as terminated..) may

appear to suggest that, termination of the earlier treaty is automatically triggered when the substantive criteria provided therein, such approach disregards the contextual and primarily the systematic interpretation of the provision according to which, Article 59 VCLT, like other grounds for treaty denunciation, remains subject to a specific termination process pursuant to the fundamental procedural rule on invalidity, termination, withdrawal from or suspension of the operation of a Treaty, enshrined in Article 65 VCLT³⁷.

In line with the overarching objective to safeguard the validity and ensure the preservation of international treaties the procedural prerequisite of former notification operates in this context as a “bulwark” against the unilateral and without further qualification of substantive or of procedural nature, denouncement of a Treaty³⁸. Rather, the implicit termination of an international agreement may be triggered under this procedural safeguard which guarantees that the substantive prerequisites for essentially “disarming” a treaty, endorsed in Article 59 are indeed fulfilled.

In the context of intra-EU BITs disputes, the EU Commission’s observation in the *Eastern Sugar* case, according to which “to terminate such agreements Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves”, seems to incorporate a denial of the *inter se* BITs automatic termination scenario and simultaneously, a recognition of the necessity to comply with the procedural rules on termination provided by the agreement at stake. Also in the *Eureko* case, the Commission’s statement that “eventually, all intra-EU BITs will have to be terminated” demonstrates that neither the EU institutions endorse the event of EU accession of the Czech Republic and Slovakia as capable to trigger the automatic termination of their pre-accession intra-EU BITs³⁹.

Hence, it shall be concluded that seen through the international law lenses, intra-EU BITs are not automatically terminated by virtue of the States accession to the EU. Instead, they remain valid and applicable at least until their termination in accordance with the relevant termination procedure as prescribed under Article 65 VCLT.

b. THE “SAMENESS” REQUIREMENT

³⁷ According to this provision, a State invoking “...a ground for impeaching the validity of a treaty or terminating it... must notify the other parties of its claim”/ 65(1)

³⁸ reminder to the Contracting States that in the area of multilateralism, unilateral “exit tickets” shall not exist, as Reinisch aptly submits. 42

³⁹ *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).

Concentrating to an analysis of the substantive prerequisites set forth in Article 59, it is evident that termination of the intra-EU BITs could be argued on the basis of the *lex posterior* rule, since as the “posteriority” requirement *per se* is normally fulfilled because all intra-EU BITs have been concluded before accession of at least one of the signatories to the EU⁴⁰. However, the “posteriority” requirement does not operate autonomously here, but in conjunction with the subjective “sameness” requirement. Thus, the question arising is whether intra-EU BITs and the TFEU relate to the same subject? And which are the conceptual limits of the sameness requirement? What is of crucial importance to address, is whether the “sameness” condition refers to an identity of subjects in the sense of a strict subjective overlap or an incidental coincidence in subject matters suffices to trigger the application of Article 59 TFEU.

The notion of subjective “sameness” in the context of international treaties subrogation constitutes one of the most obscure issues of international law and it is particularly doubtful whether it could serve as a concrete condition for applying a conflict rule; As illustratively stated in the Japanese Alcoholic Beverages case, “the concept of “likeness” is a relative one that evokes the image of an accordion”. As the accordion stretches and squeezes, the “version” and the “volume” of likeness is subject to constant shifts of perspective could render same a subject that was previously seen as diametrically different.

The version of “sameness” Article 59 VCLT looks for is of such nature and intensity that could give rise to incompatibilities gross enough as to rendering impossible the simultaneous application of both treaties. In the intra-EU BITs context, it is seriously questionable whether the application of a BIT and particularly its substantive provisions *per se*, even found to some extent overlapping, would in any event undermine or impede the application of internal market provisions. As the tribunal in *Eastern Sugar* found, the fact that two legal regimes might be found comparable or overlapping does not necessarily render them incompatible.

Therefore, it shall be concluded, that the “similarity” criterion inserted in Article 59 VCLT does not refer to a mere subjective coincidence or to a *lato sensu* conception of “likeness”. On the other hand, neither a “word by word” approach to assess “sameness” of subjects seems in line with the rationales underlying the Article 59 VCLT constellation. In the *Eureko* case, the tribunal approached the subjective similarity criterion as a concept sharing some common features with the notions of “identity” operate in the context of the doctrine of *res judicata*. In this sense, as it concluded, “the later treaty must have more than a minor or incidental overlap with the earlier treaty.”

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c. DO INTRA –EU BITS AND THE TFEU PROVISIONS RELATE TO THE SAME SUBJECT MATTER?

In the view of the respondent States involved in the *Eastern Sugar* and *Eureko* arbitrations, the intra-EU BITs and the TFEU share the same objective scope. To enhance this argument, the respondents proceeded to a comparative analysis of the protective standards incorporated with the inter se IIA's and those provided under the EU framework on investment protection, in order to underline their corresponding nature. Under this constellation, cross-border investment admission and protection would be ensured principally under Article 63 TFEU on the freedom of capital movements and payments. Further, the Fair and Equitable Treatment standard would be guaranteed under the prohibition on discrimination enshrined in Article 18 TFEU, while protection against expropriation would be provided under the equivalent operation of general principles of EU Law.

However, this “equivalent devices” constellation was not convincing to the tribunals. Admittedly, at the heart of both normative frameworks lie the promotion of cross-border investment and the development of a solid and stable legal system to efficiently protect foreign investment, as the *conditio sine qua non* for the attraction of transnational investment. However, a more thorough penetration into the teleological foundations of those regimes reveals that they were driven from different momenta.

The EU investment protection framework, which is structured upon the TFEU provisions on the liberalization of the EU market, primarily focuses on the elimination of any obstacles that could impede access and ultimately on the creation of a supranational economic union. In this sense, it concentrates particularly on the pre-investment stage, whilst BITs incorporate a broad palette of substantive rights and remedies conferred to the investor at the post-investment phase, to be ultimately enforced under the auspices of international investor- State arbitration. Certainly, the liberalization of capital flow is also present within the context of a BIT, however not as a primary goal but as a supplementary, supporting “equipment” for the smooth and efficient operation of an investment; its overarching objective remains the provision of a high and sophisticated level of protection for investors once the investment has been effectuated.

Therefore, while there may be some partial overlap between those frameworks, it does not suffice to validly assume that they address the same subject matter. Indeed, some of the EU market-access guarantees enshrined in the EU Law may offer partially

some functional equivalence to the BIT standards e.g. the free transfer provisions may be considered as covered to some extent by the principle of free movement of capital pursuant to Article 63 TFEU. However, the nature and the width of the rights conferred by the BITs to investors substantially differ from those deriving from the TFEU which, as a multilateral instrument constructed in a more general, abstract basis exactly in order to achieve a wide scope of applicability, seems to provide only for a minimum standard of investment protection.

From another perspective, reference to the maxim of *lex specialis derogat lex generalis*, one of the methodological cornerstones of legal interpretation and resolution of normative conflicts also in the field of international law, may further elucidate the functional and conceptual inequivalence between EU Law investment protection framework and intra-EU BITs, even from a more general point of view⁴¹⁴². Given the structure of the TFEU as an multilateral instrument of extremely broad coverage, a BIT could be seen as a *lex specialis*, a special rule that should take precedence over the general framework provided in the TFEU, as a valuable elaboration and supplementation on the existing general rules, an effective and accurate addition to its normative dynamic, *ratione materiae*, *ratione personae* etc. In this sense, those two regimes cannot be considered “same” merely because they may both be invocable in regard to the same factual situation.

The diametrical differences in the nature and the width of their normative scope i.e. specialized versus general framework, are presumptive of the long distance separating those regimes *ratione materiae* and *ratione personae*. *Ratione materiae*, the, corresponding to the respective BIT provisions, internal market rules deal with investment protection in a rather peripheral manner, by providing a basic outline of protection.

More importantly, the EU legal framework does not provide the same or equivalent “device” to investor-State arbitration clause typically found in BITs as an alternative -to recourse to national courts- adjudicatory “path”. Those clauses equip the investor with the powerful and indispensable tool to commence arbitration proceedings against the host State before an arbitral tribunal, when confronted by a violation of its rights deriving from the BIT. In this regards, BITs create a more comprehensive protective structure by furnishing, in comparison with the *lex generalis*, -here the TFEU provisions-, the deeper, more detailed regulation of cross-border investment protection

⁴¹ Hanno Wehland, Intra-EU investment agreements and arbitration: is European Community law an obstacle?

⁴² Also, the interaction of the *lex specialist* maxim with other interpretative installations such as the *lex posterior specialis* derogate *lex generalis* is considered also relevant in an attempt to crystallise the hierarchical statuses of a general framework and a more specific one. According to some authors, *lex specialis* even if it is the earlier one overrides a later, more general rule.

via the introduction of special standards such as the fair and equitable treatment (FET), the protection against expropriation etc. Hence, these international investment law norms could be seen as constituting a special law, substantively more closely related and practically more relevant to the issue that both frameworks seek to regulate. Certainly, BITs derogate from the general normative framework in the sense that they regulate a particular area with greater clarity and definiteness, concreteness and sufficiency, also by filling any lacunae exposed in the normative corpus of the more general framework.

Ratione personae, the intra-EU BITs apply between and govern the relationship of an investor from the one contracting State with regards to his activities in the territory of the other contracting State and *vice versa*. In this sense, they constitute a personalized bilateral, strictly *inter partes* arrangement, particularly specialized and thus of limited, very specific application *ratione personae*. On the other hand, the comparable TFEU provisions regulate the internal market *erga omnes* i.e. for all EU physical and legal persons.

To examine in more detail whether the partial overlap between intra-EU BITs and the EU Law investment guarantees corresponds to functional and conceptual equivalence between the respective standards and guarantees, I will refer to some typical BIT features and address their comparability with the EU investment protection structures.

i. THE FAIR AND EQUITABLE TREATMENT (FET) STANDARD

The fair and equitable treatment (FET), is considered one of necessary “ingredients” of a solid investment protection regime, also incorporated in intra-EU BITs and one of the most commonly invoked protective standards in investment disputes. Essentially, the doctrine serves as a gap-filler, and an overarching, autonomous clause of protection to enclose all possible violation of the investor rights that could not fall under the conceptual umbrella of more specific standards of protection such as the prohibition of expropriation.

The substance of the FET standard is closely related to the principle of bona fides and the prohibition of *venire contra factum proprium* (estoppel). In the *Saluka* case, the arbitral tribunal proceeded to a concrete summary of the standards content by stating that a State’s act could be found as a FET violation when it is manifestly inconsistent, non-transparent(i.e. not related to some rational policy) or discriminatory (i.e. based on

unjustifiable distinctions). In the NAFTA case *Waste Management v Mexico*, the tribunal found that a conduct attributable to the State is arbitrary, grossly unfair, unjust and unreasonable, discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process, is considered an infringement of the minimum standard of fair and equitable treatment.

It derives from the above considerations, that the argument according to which the protection afforded by a BIT provision on fair and equitable treatment is entirely and effectively absorbed by the equivalent EU Law prohibition on discrimination, as argued in the *Eureko* case, shall not be accepted. Discrimination against an investor could serve as a serious indicator of a potential breach of the FET standard, however, not as the only one. Admittedly, the conceptual width of the FET guarantee, inherently enclosing notions of legal predictability and stability, transparency and observance of the investor's legitimate expectations, exceeds that of the EU prohibition on discrimination which merely imposes an obligation on Member States to abstain from directly or indirectly discriminate between EU nationals. In this regards, from a textual but also contextual point of view, there is not any independent, autonomous principle codified in the EU law that specifically forbids treatment that is not "fair and equitable" in a sense equivalent to that achieved by the FET standard.

The same applies for the "dominant element" of the FET standard, the notion of legitimate expectations. In the *Tecmed* case, the arbitral tribunal defined the meaning of this concept from the following perspective: "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations". Under the EU Law, the concept of legitimate expectations is nowhere found as an autonomous norm of protection. On the contrary, the ECJ seems not to endorse the operation of such principle that could eventually restrict the regulatory space of public authorities and curtail the discretionary powers of the State to implement structural policies, as it has demonstrated in its *Alcan* judgement⁴³.

As the *Eureko* tribunal found, there is no independent principle, encompassing the concepts of non-discrimination, proportionality, legitimate expectations and of procedural fairness, yet established in EU law. Rather, equivalence –if any- could be deemed to derive from a bundle of principles, including the principle of non-

⁴³ . para 25alcan

discrimination, which, in their cooperation and interplay could potentially produce an effect comparable to that of the FET standard. .

However, the operation of each and every of these EU Law principles is not detached from the fundamental EU public policy considerations nor unconditioned, as the operation of the FET standard is⁴⁴. Rather, they are subjected not only to the derogations provided by the TFEU itself as grounds to justify restrictions on the afforded protection, but also to the implicit limitations developed by the ECJ in the *Cassis de Dijon* and the *Gebhard* cases, such as the “rule of reasoning”⁴⁵.

It is therefore assumed that the FET standard operates in a more comprehensive, broad and legally certain manner. Illustrative examples that depict how broad and stretchable the scope of protection accorded by the FET standard is, are cases where measures that could not qualify as direct expropriations were eventually regarded as constituting a violation of the BIT rights under the FET standard of protection⁴⁶.

ii. THE FULL PROTECTION AND SECURITY STANDARD

The same considerations addressed with regards to the functional and conceptual inequivalence of the FET standard with the perceived as corresponding EU provisions, apply also in the context of the full protection and security standard, a typical feature of BITs, sometimes equated as a concept with or even absorbed by the FET standard⁴⁷.

In the *Eureko* case, the respondent argued that the standard of full protection and security as a BIT constellation is inapplicable as superseded by the EU Law, since the freedom of establishment in conjunction with the EU prohibition on discrimination, provides the same level of protection accorded by the BIT standard. The tribunal was not convinced from the argument and emphasized the insufficiency of the compared EU provisions to guarantee such a comprehensive framework of protection as the full protection and security structure ensures. The tribunal particularly focused its analysis on the fact that the EU freedom of establishment is basically concentrated, *ratione temporis*, to provide protection from discrimination in the pre-establishment stage while the right to full protection and security subsists for as long as the investment remains in place, no matter whether or not the treatment complained of is discriminatory.

⁴⁴ (They rarely contain express limitation or permit co-called non-precluded measure foto47).

⁴⁵ ” foto 47 ect 98

⁴⁶ Another interesting argument supported by the arbitral tribunal in the *Eureko* case, that furtherly the “accentuates” the absence of conceptual and functional equivalence between the EU prohibition of discrimination and the FET standard is the following: even if the standard is linked to the principle of non-discrimination as inserted in the corpus of EU Law, an erga omnes enforcement -regardless of nationality or other distinction, thus not discriminatory per se- of a measure that undermine or does not grant the fair and equitable treatment, cannot immune the measure from being challenged as a violation of the investor rights under the BIT standards. 251

⁴⁷ Schreuer 163

iii. PROTECTION AGAINST EXPROPRIATION

With regards to protection against direct or indirect expropriation as “the most severe form of interference with property”⁴⁸, EU Law does not provide for any prohibition or limitation on the Member States right to expropriate alien property, comparable to those incorporated in intra-EU BITs.

Article 345 TFEU provides that “this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”. It follows from the wording of the Article 345 TFEU that Member States have not relinquished their sovereign right to regulate pursuant to national systems, the area property ownership, which eventually is left outside of the TFEU “umbrella”. In this sense, EU Law does not, *in principio*, contain a specific and clear legal framework for the regulation of property expropriation. The fact that any State interferences with private property shall be non-discriminatory and proportionate to the aim that is sought to be achieved, pursuant to the overarching EU principles of non-discrimination and proportionality of aim and effect, does not seem to “insulate” investors from the direct threat of expropriation. At the other side of the spectrum, BIT protection against expropriation is offered in an absolute, categorical and unconditional manner.

The additional argument that the EU Fundamental Rights Charter⁴⁹ constitutes a “protection device” equivalent to that of BIT framework against expropriation, commonly presented by the respondent Member States in intra-EU investment disputes, suffers from two fundamental weaknesses; although covering protection of property rights, the Charter’s protective guarantees can only be invoked against EU measures, i.e. in cases where it is the implementation of the EU Law by EU institution and Member States that mandates or triggers the adoption of the measure adversely affecting private property⁵⁰. In this sense, measures of purely national origin (including measures regarding property ownership which under Article 345 TFEU remain a matter regulated on national basis) are left outside the CFR’s protective scope. Furthermore, it is seriously doubted whether the CFR and the ECHR provide, in essence, an independent basis for EU nationals to challenge measures adopted by Member States in their capacity not as sovereigns (*acta jure imperii*) but as private economic (and commercial) actors (*acta jure gestionis*).

iv. BIT ARBITRATION CLAUSES

⁴⁸ Schreuer 98

⁴⁹ See Article 6(1) TFEU. The EU CFR is confirmed to have the status of law directly applicable within the EU in accordance with the ECJ’s judgements in the Kadi and Hauer cases.

⁵⁰ Article 51 see fotos 48

The argument of protection “deficit”, from which EU investment guarantees seem to suffer, if compared to the respective intra-EU BITs standards, finds its most articulate expression in the context of arbitration clauses, typically incorporated in BITs. Under this procedural alternative, conceive as a “holy gift” to the investor’s disposal, any measure allegedly constituting a breach of the substantive guarantees provided in a BIT, could be brought, directly by the investor, under the “judicial microscope” of an international investor-State arbitral tribunal. As Wälde aptly observed in its Separate Opinion in the *International Thunderbird Gaming Corporation v Mexico* case⁵¹:

“investor state arbitration does not set up a system of resolving disputes between presumed equals as in commercial arbitration, but a system of protection of foreign investors that are, by exposure to political risk, lack of familiarity with and integration into an alien political, social, cultural, commercial, institutional and legal system, at an advantage”.

In line with these considerations, if the private investor versus State relationship of innate inequality is conceptually akin to the “David and Goliath” biblical constellation, BIT investor-State arbitration clauses constitute the only parameter that could, at least procedurally, ensure a level playing field between those actors.

The tantamount importance of investment arbitration and its indispensable value in safeguarding the investor’s rights was also accepted by the *Eureko* tribunal as factor manifesting the irreconcilable of the conceptual and functional inequivalences between EU investment guarantees and the intra-EU BITs standards of protection. In the words of the tribunal:

“the third main reason for rejecting the jurisdictional challenge based on VCLT Article 59 may be stated simply. An essential characteristic of an investor’s rights under the BIT is the right to initiate UNCITRAL arbitration proceedings against a State party (as the host State)... Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state; and, moreover, the locus standi of an investor under the BIT, with its broad definition of “indirect” investments under Article 1, is unlikely to be replicated under the court procedures of an EU Member State⁵²”

⁵¹ Separate Opinion of Thomas Wälde in the *International Thunderbird Gaming Corporation v Mexico* arbitration under Chapter XI of the NAFTA and the UNCITRAL Arbitration Rules, para. 12.

⁵² para. 264 also accepted by *Easter Sugar* tribunal in para 165.

Indeed, EU Law does not provide for any mechanism, identical, or even comparable to the international investor – State arbitration, under the auspices of which, an individual may directly sue a State, claiming violation of his rights due to a governmental interference. According to Article 258 and 259 TFEU, actions against Member States can be brought only by other Member States or by the Commission, where it is deemed necessary.

In light of these considerations, it is more than evident that the equivalence argument set forth by the respondent States in the majority of intra-EU investment arbitrations, lacks of these solid conceptual foundations that would facilitate its further development.

Eventually, the most important element in answering the question of potential overlap and incompatibility of the BIT standards with the EU Law principles, is the fact that those standards relate to different legal relationships and guarantee different rights . In this regard, it shall be concluded, that even in a case were the same claim may be validly raised based on one of those provisions, this does not render them overlapping and even more, the application or the invocation of one does not excludes the applicability or threatens the validity of the other.

d. THE “INTENTION OF THE PARTIES” CTITERION

The first cause of tacit abrogation of an earlier treaty pursuant to Article 59 VCLT is based on a subjective criterion relating to the common intention of the parties as an uncontested “evidence” to support that the replacement the former treaty by the latter was the indeed, the ultimate “desideratum” of the contracting states.

In the intra-EU Bits, the practice of the majority of EU Member States, clearly at odds with the alleged will to terminate their inter se IIA’s, manifestly demonstrates the clear and absolute absence of any concrete intention of States to subject the regulation of intra-EU investments exclusively to the EU Law. The issue of intra-EU validity and applicability was not “visited” in the course of accession processes or in the consultations following accession⁵³, but also, the wording of the Accession Treaties says nothing in this regard. In the Eureko tribunal’s words:

“There is, however, no evidence of any intention that the provisions of EU law should result in the termination of the entire BIT. Nothing in the text of the EU treaties produces that result; and the necessary intention is not

⁵³ Eastern sugar, para.151

established by extraneous evidence. Indeed, such evidence as there is indicates that there was no or, at least, no clear intention that the BIT should be terminated by any of the CSFR Association Agreement, the Association Agreement, the Accession Treaty or the Lisbon Treaty⁵⁴.

Member States remained that silent also in the context of the Lisbon “competence shift” and its implication in the area of EU CCP, as well as vis-à-vis the ECJ’s involvement in the review of compatibility of some extra-EU BITs cases. Further, they seem to hold diametrically opposing views on whether accession in the EU develops termination effect with regards to prior concluded treaties. In fact, some intra-EU BITs have been modified after the events of EU enlargements e.g. the Germany-Poland BIT.

But even if, *arguendo*, the intention of Member States could be otherwise manifested or even implicitly inferred, it shall be noted that, the BITs themselves and the framework of protection provided therein per se, functions as a factor indicative of the parties’ genuine will on how exactly they wished to regulate the issue at stake, in a substantive but also procedural level. In this respect, the substantial, specific, indispensable nature of protective standards provided under BITs, as legal safeguards to the investor’s disposal, does not leave much space to even speculate the existence of EU Member States’ intention, to explicitly or implicitly confirm EU Law as the ultimate and sole successor of the intra-EU BITs, by entirely displacing them. Therefore, as it has been accepted also by the *Eureko* tribunal, it is seriously doubtful whether the signatories of an intra-EU BIT could genuinely intend to replace the specialized and comprehensive BIT regime by a more general framework of protection such the one provided by the TFEU⁵⁵.

e. “INCOMPATIBILITY” OF PROVISIONS OF THE LATER TREATY WITH THOSE OF THE EARLIER TREATY

Under Article 59 VCLT(1)(b), there is another circumstance permitting the implied abrogation of the earlier treaty, that relates to the “impossible” of its simultaneous application with the later, due to the severe incompatibilities of its provisions with those of the other treaty. In asserting whether and under which circumstances the objective criterion of “incompatibility” is met, a leading VCLT Commentary quotes the 1963 ILC

⁵⁴ Para 244, Similarly eastern sugar para. 147

⁵⁵ It has been also suggested that Member States’ intention to terminate intra-EU BITs may have been expressed in an implicit manner, as deriving from the Member States’ common will to establish the Internal Market framework and regulate intra-EU investment exclusively by the respective provisions on the fundamental EU freedoms. However, to accept the realization of a “regionalistic” aspiration and its implications as capable to ipso facto eliminate the BITs system as an international investment law norm, seems an over-stretching approach.

Report⁵⁶ where it was emphasized that “the existence of an incompatibility between two treaties shall create, above all, a strong presumption that the intention of the parties was to abrogate the previous treaty; a presumption that could not be set aside unless there were elements to establish a contrary will of the states”. Such a presumption regarding the intentions of the contracting parties is absent in the case of intra-EU BITs, as it has been already demonstrated⁵⁷.

Furthermore, the VCLT Drafting Committee has suggested that the existence of a mere differentiation in the material scope of the two treaties cannot necessarily or securely imply incompatibility. This approach has been endorsed by the *Easter Sugar* tribunal, which concluded that “the fact that the rights are unequal does not make them incompatible”⁵⁸. In fact, where the earlier treaty provides for a broader scope of protection than that of the later one, this difference shall be deemed to constitute a source of additional, complementary protection rather than incompatibility.

This is particularly relevant in the context of the intra-EU BITs and the TFEU. It is clear that although those two regimes are of sui generis nature and demonstrate significant conceptual and functional divergences, the guarantees they contain essentially commit to the attainment of the same goal, namely to the protection of investors/ market participants against the host State/ other EU Member States. Under this prism these guarantees cannot be considered as incompatible with each other. Therefore, it shall be concluded, that since neither the subjective nor the objective criterion set forth by Article 59 VCLT are fulfilled, Article 59 VCLT cannot provide for an answer to legal conundrum of the tacit abrogation of the intra-EU BITs by the TFEU.

II. THE APPLICABILITY OF ARTICLE 30 VCLT

In the battle to clarify the status of intra-EU BITs vis-à-vis EU Law, Article 30 VCLT has also been invoked from the respondents in the prominent *Eastern Sugar* and *Eureko* arbitrations, as a possible ground for not their invalidity but the inapplicability of some of their provisions found to be incompatible with the EU.

Article 30 (3) VCLT operates as a “second chance” provision in the sense that, where application of Article 59 VCLT has been excluded, the operation of the earlier treaty can still be diminished, however not with regards to all of its provisions but in an ad hoc basis. More specifically, Article 30 (3) VCLT inserts a “priority rule” activation of which could render inapplicable those provisions of the earlier treaty that are found

⁵⁶ 1341 (The Vienna Conventions on the Law of Treaties: A Commentary, Volume 1, Olivier Corten, Pierre Klein, Oxford University Press, 2011),

⁵⁷ (intention of the parties section).

⁵⁸ 170 also *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010).para. 263

incompatible with the provisions of the subsequent treaty. This “incompatibility” criterion was invoked by the Commission in the *Eureko* case as present in the case of the Dutch-Slovak BIT, particularly with regards to the investor-State arbitral mechanism provided therein under Article 8 of the BIT⁵⁹.

As it has been already demonstrated, arbitration clauses contained in BITs provide for the direct attribution of an enforceable right to the investor to bring a claim against the host State, for matters arising out of an investment, before a binding adjudicatory mechanism operating under the rule of law. At the other side of the spectrum, the EU judicial system is based upon the general jurisdiction of national courts and does not provide for the possibility of an alternative international judicial forum, where an investor could directly sue a Member State alleging breach of his rights under the respective protection framework. On this basis, how could those two distinct regimes could be rendered incompatible in the sense that the application of the one necessarily violates the other?

The answer the *Eureko* tribunal gave, when confronted by the argument of incompatibility of investor-State arbitration and EU Law, was the following:

“There is no rule of EU law that prohibits investor-State arbitration. Far from it: transnational arbitration is a commonplace throughout the EU, including arbitrations between legal persons and States; and the European Court of Justice has given several indications of how questions of EU law should be handled in the course of arbitrations, including important questions of public policy. It cannot be asserted that all arbitrations that involve any question of EU law are conducted in violation of EU law. The argument that the availability of arbitration for some but not all EU investors would amount to discrimination in violation of EU law was addressed above, where it was decided that the answer is to extend rights and not to cancel them”⁶⁰.

III. CONCLUDING REMARKS

It shall be by now clear that, from an international law perspective and pursuant to an analysis centered around the relative international law norms on treaty-conflicts resolution, the question whether intra-EU BITs remain valid and applicable shall be answered to the affirmative. Further, the partially overlapping scope between intra-EU BITs and the comparable EU investment protection guarantees, albeit not to be disputed, does not suffice to render those regimes incompatible with each other.

⁵⁹ European Commission Observations, 7 Juli 2010, quoted in *eureka* Para 193.

⁶⁰ Para. 274

Neither Member States shall be conceived as “suffering” from any “contradictory obligations” dilemma when required to fulfill their engagements deriving either from BIT or from TFEU provisions. Rather, intra-EU BITs shall be construed as a more comprehensive and thus, complementary source of protection afforded to the investors that could certainly operate in conjunction with the EU protection norms and counter-balance the deficiencies, evident within the EU system of protection.

CHAPTER 5

INTRA-EU BITS: IN HARMONY OR IN VARIANCE WITH EU LAW?

As getting into the core of this legal conundrum surrounding intra-EU BITs compatibility with EU Law, the fundamental question that arises is the following: is there really a conflict?

A. ARE DIFFERENT STANDARDS OF PROTECTION COMPATIBLE WITH THE EU?

In order to determine this issue a preliminary remark is necessary: the mere lack of conceptually or structurally identical -substantively or-and procedurally- standards of protection between two competing frameworks, which may entail divergences in the width of the protection afforded, cannot *per se* be regarded as a sufficient ground to allege an opposition or an irreconcilable conflict between these co-existing protective frameworks.

As a matter of fact, the EU Law, even in the post-Lisbon era, nowhere expressly mandates the unification or even the harmonization of intra-EU investment protection or dictates compliance with any protection *minima* or *maxima* of EU origin, neither proceeds in preventing Member States from adopting a more comprehensive framework of protection that grants higher level of security and certainty to foreign investors through a BIT. Thus, Member States are in *principio* not precluded from EU Law to provide additional -to what is already granted by other regimes- protection to investors operating in their territory and essentially to enhance and even optimize the position of the investor *vis-à-vis* the host State's sovereign powers⁶¹.

Hence, the existence of intra-EU BITs operating as a complementary source of protection extending the spectrum and enhancing the volume of protection afforded to foreign investors by the EU Law, cannot be conceived *per se* as opposing to the fundamental principles of EU Law. Those co-existing regimes, even from a slightly different angle and in different degree of intensity, essentially pursue the same goal i.e.

⁶¹ This scenario of an additional protective framework providing for higher protection and the prevalence that shall be accorded to such more favorable for the investor regime is also endorsed by the Czech-Netherlands BIT stating in Article 3(5) that: "If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the present Agreement, such rules shall to the extent that they are more favorable prevail over the present Agreement".

the protection of the investor and the liberalization and incentivisation of inbound cross-border investment⁶². From this perspective, as Söderlund puts it, intra-EU BITs “are in harmony, and not at variance, with EC law⁶³”.

B. THE DISCRIMINATION ARGUMENT AND THE EXCLUSIVE ECJ JURISDICTION

One of the most crucial aspects of the conceived normative clash between intra-EU BITs and EU Law, relates to the allegedly discriminatory effect of their application that directly violates EU fundamental principles of equal treatment and non-discrimination. Under this perspective, their survival within the EU investment scene and their simultaneous application with the TFEU provisions could seriously disrupt the “equilibrium” achieved by the operation of these overarching EU principles and entail the establishment of a two-speed investment protection framework within the a highly integrated area, as the EU Legal order.

The EU concerns particularly concentrate on the procedural “opportunity” accorded exclusively to foreign investors covered by an intra-EU BIT to enforce the substantive rights granted under the IIA through an alternative “path”, namely through the investor-State arbitration⁶⁴.

Indeed, the conferral of a direct right to pursue claims on violation of his rights against the host State through investment arbitration instead of seeking redress in the national court systems, constitutes a considerable advantage to the disposal of intra-EU BIT covered investors. Since this alternative forum for investment disputes resolution is not available to investors falling outside the BIT’s scope *ratione personae* (i.e. to these investors covered by the TFEU investment protection framework), investor-State arbitration as a “procedural addition” to the scope of intra-EU BITs protective framework could allegedly lead to the preferential treatment of BIT-covered investors (more favorable treatment than that enjoyed by an investor not covered by a BIT) , a phenomenon prohibited within the EU, under Article 18 TFEU and the principle of non-discrimination⁶⁵. As Hindelang puts it, “not each and every Member State

⁶² See *supra*, note 13, pp. 407.

⁶³ sel 161 soderl

⁶⁴ However, the following considerations shall be deemed to apply, *mutatis mutandis*, also with regards to the majority-if not the entirety- of the intra-EU BITs protective standards, if challenged under the non-discrimination argument.

⁶⁵ A doctrinally coherent analysis of the discrimination argument requires a thorough understanding of who exactly Article 18 TFEU, seeks to protect when stipulating that “any discrimination on grounds of nationality shall be prohibited”. Under this perspective, the prohibition of non-discrimination shall be conceived as conceptually and functionally underpinned by the principle of equal treatment which mandates the treatment of comparable situations in the same manner. Where the treatment between two

maintains BITs with all other Members. In such a situation, a host-State might be perceived to be granting an EU investor protected by a BIT more favorable treatment than an EU investor not protected by a BIT. Not being justifiable, this situation is prohibited by the fundamental freedoms.

Nevertheless, does the inclusion of the investor-State arbitration “avenue” in the intra-EU BITs, even if it potentially constitutes a source of differential treatment between intra-EU investor, particularly given its absence as an option under the EU investment protection framework, generates any obligation to Member States to eliminate it as a possibility by terminating their intra-EU BITs?

The arbitral tribunal in the *Eureko* case, instead of engaging in an analysis of the discriminatory or not effect of intra-EU BITs, preferred to emphasize again the complementary nature of the rights conferred under the intra-EU BITs and further, to provide an answer to this important question. Accordingly, the tribunal concluded that:

“There is moreover no reason, legal or practical, why an EU Member State should not accord to investors of all other EU Member States rights equivalent to those which the State has bound itself to accord to investors of its EU bilateral investment treaty partners – or, indeed, to investors from States that are not members of the EU. Certainly, it is not for an arbitral tribunal to cancel rights created by a valid treaty in order to safeguard a State party against the possibility that it might one day decide to apply the treaty in a way that could violate its obligations under one or more other later treaties⁶⁶”.

Under this perspective, discrimination issues, if eventually present in the context of intra-EU BITs, could be resolved in two ways: a) by elimination of the preferential treatment at stake or b) by extending the privilege to all others being in the same situation under the Most Favored Nation constellation dictating the equal treatment of all individuals (here, of all the investors operating in the territory of a Member State) according to the highest standard granted to any of them. The *Eureko* tribunal clearly was in favor of the latter solution. And as it seems, it was not the only one.

The same position was adopted also by the ECJ in the *Matteucci* case where the Court reviewed the status of a cultural bilateral agreement between Belgium and Germany through the prism of the fundamental, under the Community Law, principles of non-discrimination and equal treatment. The ECJ acknowledged that by establishing

is situations is different, the crucial element to assert discrimination is whether those situations are similar, or not. If they are not, then the differential treatment does not constitute a problematic issue under the principle of equality. If they are similar, then the differential treatment, if not justifiable, constitutes a discrimination prohibited under Article 18 TFEU.

⁶⁶ E *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010), para. 267.

and granting of rights only in favor of nationals of Belgium and Germany, this intra-EU bilateral agreement was discriminating against nationals of other Member States, thus violating the principle of equal treatment and the prohibition of discrimination, the pillars of the EU structure. What the Court did not do, despite being confronted by a gross and direct breach of the principle of non-discrimination, was to demand the disapplication or termination of the concerned Treaty. Rather, it ordered the “multilateralization” of the benefits granted by virtue of this Agreement by extending them also to nationals of other Member States as a solution to alleviate this conflict.

The ECJ adopted the same stance in the *Saint Gobain* case, by pointing out the unilateral extension of advantages deriving from a Germany-US and a Germany-Swiss agreement on the avoidance of double taxation, from Germany to economic operators established in other Member States, as the most appropriate solution to eliminate the discriminatory effects present in the given case. In the same lines were the ECJ’s judgements in the *Gottardo* and in the *Open Skies* cases.

From this point of view, an attempt from the Member States to reconcile their commitments under an intra-EU BIT with the EU non-discrimination prohibition, by extending the privileges afforded by the BIT also to investors having the nationality of other Member States, is an approach in principle welcomed by the EU Law, as it has been demonstrated by the ECJ’s jurisprudence, confirming the existence of a MFN-treatment obligation also in the EU legal order⁶⁷.

However, in its observations submitted to the *Eureko* arbitral tribunal, the EU Commission rejected the suggestion that discrimination could be resolved positively, by operation of the MFN-treatment constellation, hence, not by eliminating the investor-State arbitration mechanism but by extending the preferential treatment i.e. the jurisdictional privileges deriving from the BIT arbitration clauses, also to investors from other EU Member States⁶⁸⁶⁹

The Commission perceived a potential application of the MFN treatment structure as “unacceptable from an institutional EU law perspective and as misunderstanding of the EU judicial system, which is “firmly opposed to the ‘outsourcing’ of disputes involving

⁶⁷ See supra, note 13.

⁶⁸ *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010), para. 184

⁶⁹ The possibility of extending procedural rights, including the right to resort to arbitration, to third parties by operation of the MFN treatment clause has already been affirmed in the leading *Mafezzini* case, where the tribunal held that “if a third-party treaty contains provisions for the settlement of disputes that are more favorable ... than those in the basic treaty, such provisions may be extended to the beneficiary of the [MFN] clause as they are fully compatible with the *eiusdem generis* principle”. para 56)

EU law” to tribunals outside the EU courts, for the reasons set out by the ECJ in the MOX Plant case⁷⁰.

⁷⁰ Eureko BV v. The Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010), para. 184

CHAPTER 6.

STATE AID LAW CONSIDERATIONS IN THE CONTEXT OF INTRA-EU BITs INVESTMENT ARBITRAL AWARDS

Probably as one of the most practically important of the multifaceted and multileveled implications resulting in from the confrontation between two legal norms, EU Law and intra-EU BITs, relates to the EU State Aid regime. The tension generated by this confrontation basically derive from the simple fact that during the course of the “journey” to transform the EU integration envisagement to a fully tangible reality, and particularly at the events of Union’s enlargements, EU law may –and already has– mandated the adoption by the Member States of measures that eventually contradict with and arguably undermine obligations undertaken by the States vis-à-vis foreign investors, in the form of investment guarantees stemming out of BITs and closely relate to the economic value of the investment (e.g. subsidies). At the point where these autonomous sets of obligations, of EU and of international origin respectively, clash, the fragments of this collision could seriously injure investment protection under BITs.

A. AN OUTLINE OF THE EU STATE AID REGIME

The core provision of the EU State Aid control system, is Article 107(1) TFEU , which states that, “save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

Under this regime Member States are generally prohibited from granting any financial measure conferring an economic advantage to undertakings, with the notion conceptually encompassing also investors as independent economic actors operating in an organized and strategically structured manner, that are capable of developing a distortive effect on competition within the EU. The activation of the principal prohibition of State aid as a “phenomenon” *prima facie* incompatible with the conceptual and purposive dimensions of EU internal market, is premised on the fulfillment of five constituent elements and conditions. Accordingly, a financial intervention qualifies as State aid when the below criteria are cumulatively met:

- a) the concerned financial measure is imposed by a public authority and its granted by the State or through State sources (doctrine of imputability)
- b) confers an economic advantage or benefit to the recipient(s)
- c) favors certain undertakings or the production of certain goods over others (selectivity criterion)
- d) must distort or threaten to distort competition and
- e) must be capable of affecting intra-EU trade

Where the normative requirements of Article 107 TFEU are fulfilled with regards to a specific measure brought under the EU State Aid Law scrutiny, the Member State to which the pertinent measure is attributed is enjoined to promptly recover from the recipient any illegal aid granted so as to re-stabilize the disrupted competition environment.

B. HOW DOES THE EU STATE AID REGIME PENETRATE IN THE AREA OF INTRA-EU AWARDS ENFORCEMENT?

The EU State Aid Law enters the intra-EU BITs “universe” usually in the context of some benefits granted as inducements to investors by the host States prior to their accession to the EU and in accordance to their national laws. At the moment of EU accession, these attractive “deal-sweeteners”, granted by the Member States to induce investors into investing in their territory and perhaps in a specific sector and constitute an integral, essential part of the promotion and protection package covering a particular investment, are may be transformed to unlawful State Aids, incompatible with the internal market and thus irreconcilable with EU Law. Exposed to contrarian obligations deriving from EU and from international law respectively, the Member States are confronted by a major dilemma; to retain or to reclaim the illegal State Aid; because at the same time that they are requested to withdraw and recover unauthorized illegal State Aid, i.e. to fulfill what has been pronounced as a supervening, core EU obligation by the ECJ and the Commission, (and is subject to Commission prosecution, fines and private damages actions if it fails to do so) they are additionally –and equally- bound to comply with their international law obligation deriving from the BITs, not to disrupt the environment surrounding the investment. From a doctrinally more coherent perspective, what is seriously jeopardized in this context, is the sensitive balance between the investor’s legitimate expectations to retention of a given *status quo* and the State’s regulatory interests and further, duties as the architects of the EU *acquis*.

Invocation of such pre-accession inducements would very likely bring Member States under the judicial “eye” of an arbitral tribunal, where the act of withdraw could be challenged as an alleged infringement of a Member State’s obligation to respect and comply with the protective standards deriving from the respective BIT covering the investment at stake. Possible bases for such challenge could constitute the requirement of ‘fair and equitable treatment’ of investors, guarantees of most-favoured nation (MFN) and national treatment, and protection from expropriation, some of the protective standards conceived to “safeguard” the continuity of the measure at stake. The initiation of arbitration proceedings against the Member State could possibly produce a dictum in favor of the investor that is followed by an international obligation imposed to the courts of the fora where enforcement is sought, to effectuate the tribunal’s order on damages.

At this very point emerges the *problematique* around of the issue of State’s compliance or not with intra EU arbitral awards, as seen through the prism of EU State Aid Law. This penetration of EU State Aid rules in the context of investment Law can open the Pandora’s box regarding the enforcement of arbitral awards and particularly the compliance with judicial verdicts ordering compensation in damages to alleviate a demonstrated breach of the investor rights under the BIT framework by the act of Aid revocation by the governmental “hand”. This is because, any payment of damages to be made by the State in compliance with such an award could per se be conceived from an EU perspective and particularly through the Commission’s eyes, as a violation of the EU State Aid rule of Article 107 TFEU, to the extent that it de facto re-allocates to the investor the economic advantage he previously enjoyed and was deprived of due to its withdraw.

C. GETTING AT THE CORE OF THE PROBLEM: THE DOCTRINE OF IMPUTABILITY AND ITS RELEVANCE IN COMPLIANCE WITH AN INTRA-EU AWARD IN GENERAL

Central in examining the problem compliance with intra-EU awards from the EU State Aid Law perspective, and as the ECJ has oftentimes concluded, and the decisive parameter in deciding the existence or not of illegal State Aid where such awards are eventually effectuated, is the doctrine of imputability.

According to the doctrine of imputability, only measures that were voluntarily adopted by the public authorities through some sort of action imputable to them, could qualify as State Aid falling under the normative scope of Article 107 TFEU. In this

context, the element of voluntariness is fulfilled where the measure not only is granted through State resources from an economical point of view, but “the deployment of such resources could actually be attributed to some form of government decision”⁷¹. This interpretation sheds light to the conceptual anatomy of the doctrine of imputability. Two are the constituent elements here: the *corpus* or *objective element*, demonstrated in the existence of a State’s formal action to adopt the measure at stake e.g. in a form of decision, and the *animus* or *subjective element* manifested in the quality of the State’s action as a *sua sponte* act in which the State intends to proceed on its own volition.

In this sense, no issue of contradiction or compatibility with Article 107 TFEU should rise in cases where the this *animus* element is absent i.e. where the decision to compensate is not adopted voluntarily by the Member States, it is not driven by intention but instead, it is somehow imposed. In this context, and as a matter of principle, it should be accepted that payments made as compensation for damages according to the rules governing compensation of illegal acts attributed to the State do not qualify as State Aid. As the Commission has clarified “the existence of an advantage should be ruled out in the case of... an obligation condemnation on the national authorities to compensate for damage they have caused to certain undertakings or the payment of compensation for an expropriation”⁷².

Hence, from this perspective, even if the Commission’s statement does not expressly refers to arbitral awards, there no reason for to infer by analogy that compliance with an intra-EU arbitral award, equally as with a court decision, ordering compensation in damages does not *prima facie* and without further qualification constitute a violation of the EU State Aid Law⁷³.

At the nucleus of this argument excluding compensation granted by virtue of a judicial order from the scope of Article 107 TFEU, lies a fundamental the assumption enunciated in the *Asteris* case concerning the claim of some Greek firms on compensation by the State in respect of lost legitimate aid and the question whether payment of such compensation qualifies as illegal State Aid. According to the ECJ’s ruling, “State Aid... is fundamentally different in its legal mature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damages they have caused to those individuals”. The Commission elaborated further on the conceptual distance separating State Aid from the judicially born obligation to pay damages in the *Akzo Nobel* case and confirmed that payment of damages to the recipient does not amount to illegal State Aid insofar

⁷¹ Hancher T., Ottervanger T., Slot P. J., EU State Aids, Sweet & Maxwell (2012).

⁷² COMMUNICATION FROM THE COMMISSION Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, Brussels, 2014, p20.

⁷³ Ortolani P., Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance, Journal of International Dispute Settlement, Volume 6 (2015) pp.128.

the recipient is entitled to such payment under the rules of the applicable law in the sense that his right to be reimbursed is deemed to be recognized as legitimate by the competent judicial authorities and according to judicial interpretation of the law governing the issue⁷⁴.

In that sense, to the extent that payment of damages comes as the fulfillment of a legal duty to compensate, as a *de jure* obligation legally substantiated and judicially recognized –or at least recognizable-, the imputability criterion is not met because the pertinent obligation is a creature of law and cannot be attributed to a State's action as the Article's 107 TFEU normative structure prescripts. Here, the decision to compensate is not generated intentionally, as a State's willful act; instead it is introduced by operation of law in the sense that it's "birth" is not subject to the State's discretion. Hence the applicability of State Aid prohibition shall be ruled out as the imputability element is absent.

The Akzo Nobel conceptual "dynamic" can, *in principio* and by analogy, be transpositioned in the area of Intra-EU investment awards although under the light of some crucial clarifications. The fundamental question arising in this context is whether the *Akzo Nobel* constellation could be invoked in order for the payment of damages to rule out an alleged breach the 107 TFEU prohibition, equally in cases where the entitlement to compensation derives from an intra-EU BIT and by virtue of the standards of protection enshrined therein, instead from the national law.

From a *stricto sensu* assessment, it could be argued that in the absence of an arbitral award obliging a Member State to pay compensation, to base a voluntary payment by the State merely on the theoretical existence of the recipient's respective right deriving from an alleged but not adjudicated breach of the BIT, does not suffice to rule out a violation of 107 TFEU. This is because the *sui generis* nature of the protective standards under the BIT frameworks and their broad wording leaving considerable space for conceptual divergences and interpretative maneuvering by the arbitral tribunals, which are not bound by precedence even in cases of *jurisprudence constante*, do not provide for that solid background to legally substantiate the existence of a right to compensation as the *Akzo Nobel* "escape road" requires.

On the contrary, the existence of an award confirming and externalizing the *ex lege* obligation of the State to pay compensation which derives from the applicable treaty is a sufficient ground for concluding that the decision to pay is not imputable to the State, thus payment shall be deemed as not constituting illegal State Aid. The *Akzo Nobel* reference to national law shall be interpreted broadly as encompassing any form of

⁷⁴ Judgment of the Court (Grand Chamber) of 14 September 2010. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*.

legislation constituting or implementing such a binding obligation to compensate including an international investment agreement as an international law instrument, legally binding and directly applicable to the relations between the investor and the host State.

Thus, insofar the duty to compensate emerges by operation of the international law as authoritatively assessed under the aegis of an binding adjudicatory procedure as the investment arbitration is, the imputability criterion shall be deemed as not met and therefore, payment made by a Member State to the prejudiced investor in effectuating this legal duty do not fall under the normative scope of 107 TFEU. In this sense, EU State Aid provisions cannot be invoke so as to limit or exclude the enforceability of an arbitral award on damages.

D. THE PROBLEM OF COMPENSATION AS RE-INSTALLMENT OF REVOKED ILLEGAL STATE AID

A different *problematique* arises where the arbitral award by ordering compensation does not merely aims to the alleviation of the loss suffered by the investor due to a breach of his rights deriving from a BIT, but in substance, it mandates the de facto re-installment of an illegal State Aid measure previously enjoyed by the investor. This is usually the case when a Member State proceeds to the revocation or termination, as incompatible with the EU State Aid regime, of a measure in favor of the investor, usually a deal-sweetener. Confronted by the withdraw of the beneficial measure that substantially alters the existed *status quo* surrounding his investment, the investor will allege a breach of the investment treaty and claim from an arbitral tribunal to order his compensation by the State. Where the tribunal affirms the investor's allegations, payment of compensation would amount to a reallocation of the revoked economic benefit which was regarded as incompatible with the 107 TFEU..

This was the scenario in *Micula*, a case brought under the Sweden-Romania BIT concerning the partial withdraw by Romania of certain investment incentives implemented in its legislation, in particular a series of regional aid, as incompatible with the EU State Aid scheme. As the claim brought by a group of Swedish investors arguing that the revocation of the regional aid constituted a violation of their legitimate expectations, was upheld by the ICSID arbitral tribunal, a serious threat to intra-EU awards enforceability was revealed. Followings its amicus curiae intervention in the ICSID proceedings emphasizing the gross incompatibility of the payment of compensation with the EU State Aid scheme, the EU Commission order on March 2014 the suspension of any payment to be made in compliance with the *Micula* award

until the completion of the formal investigation procedure under Article 4(4) of the State Aid Regulation and eventually, on March 2015 declared that the payment of the compensation awarded by the tribunal to the claimants “constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market”⁷⁵.

The Micula case was not the last chapter of this “story” surrounding the enforceability of intra-EU awards within the EU legal order. The grave dogmatic conflict between those two separated spheres of law and its possible implications was evident, also from an EU State Aid Law perspective, in a series of ICSID cases against Hungary, including the *Electrabel SA V Hungary*, and the *AES Summit v Hungary*, concerning the revocation of tariff schemes granted in power purchase agreements which were found contrary to the EU State Aid framework. The *AES* tribunal referred to this conflict of obligations lying at the nucleus of the clash between EU State Aid rules and the BITs protection framework and the State’s dilemma between honoring the investor’s legitimate expectations or exercising their regulatory prerogatives and imperatives to implement in its full effect the EU State Aid rules and possibly proceed in the minimization or elimination of prohibited State Aid, as they are obliged to do. In this respect, also in this case, the potential payment by Hungary of damages that de facto re-implements and re-allocates the withdrawn illegal Aid would constitute a violation of the EU State Aid rules and perpetuate the illegal distortion of competition⁷⁶.

It is more than evident that in the future, even more similar cases will monopolize the interest in the context of intra-EU awards enforceability and its direct clash with EU Law and reveal the dogmatic foundations and the intensity and depth of this confrontation, that grossly challenges both system’s orthodoxies.

Determinative factor in resolving the legal conundrum of compliance with intra-EU awards mandating the re-installment of illegal State Aid, is the nature of compensation paid to the prejudiced investor and more importantly, the very objectives underlying such payment. To specify, where payment of damages to the investor is made through a measure that, albeit formally qualifying as compensation, from an objective point of view it manifestly deviates from serving the exclusive purpose of compensation in its restorative function by seeking to return to the investor the amount of money corresponding to what was revoked as illegal State Aid and thereby eventually entails

⁷⁵ Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013 (notified under document C(2015) 2112).

⁷⁶ Also in the photovoltaic energy sector the conflict between compliance with intra-EU awards and the EU State Aid law has become relevant particularly in the context of claims brought by investors against many Member States, inter alia, the Czech Republic and Spain, regarding the abolition of previously authorized solar-friendly tariff schemes that the Commission considers to constitute illegal State Aid.

the direct or indirect granting of a new illegal aid, it shall be deemed as ipso facto violating Article 107 TFEU⁷⁷. This is because the purpose underpinning the institution of compensation in this context, is not the obtainment of the illegal economic advantage previously enjoyed, even if it was legitimately expected from the investor not to be deprived of it, as this would equal to a de facto preservation of an illegal status quo within the EU capable of eventually trigger the collapse of the EU State Aid system.

Therefore, in an attempt to safeguard the enforceability of intra-EU awards, particularly in cases where a violation of the investor's legitimate expectations under the intra-EU BIT generates the State's duty to pay damages, the compensation may escape falling under the normative umbrella of the 107 TFEU if the payable sums are thusly calculated as to cover not the actual loss the investor suffered -or could suffer- from the revocation of the illegal State Aid, as that would constitute a *de facto* reallocation of the lost economic benefit and thus a repayment of illegal State Aid, incompatible with the common market, but rather merely to relieve the investor from the wrought frustration and subversion of his legitimate expectations.

In case a State proceeds in the payment of compensation in compliance with such an intra-EU award, and especially where the Commission has already stressed that enforcement of the award would run afoul to EU State Aid regime as incompatible with the internal market⁷⁸, nothing prevents the Commission from initiating infringement proceedings under 258 TFEU against that State which, in executing the award ordering compensation of the investor, has ipso facto violated the EU Law. Under the threat of infringement proceedings, pending above them more active than ever, it is strongly questionable whether a Member State would voluntarily comply with such an award. Rather, it follows almost automatically, that when confronted with the dilemma of complying with the international law obligation or prioritize the uniform and effective application of the EU Law, the latter option is more likely to prevail.

E. EU STATE AID LAW AS A "BLOCKER" OF INTRA-EU AWARDS ENFORCEABILITY

As a matter of principle, it is upon the arbitral tribunals discretion to decide if and to which extent the nature of the revocation at stake as backed by EU Law or the prior regime's characterization as illegal in accordance with EU rules are relevant to its

⁷⁷ Ortolani P., Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance, *Journal of International Dispute Settlement*, Volume 6 (2015) pp.128.

⁷⁸ Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013.

assessment and would eventually affect its final verdict. The stance the tribunal will adopt with regards to the autonomous interpretation of the EU rules in this context, strongly depends upon the extent and the quality of EU Law's penetration in the arbitral proceedings, and its status as the applicable law to the merits of the dispute –or part from it- or only as a fact. There is no unanimity within the arbitral jurisprudence with regards to whether and to what extent EU Law enjoys a prioritized status in intra-EU investment arbitrations. At least according to the AES tribunal view, "EU law has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration national laws are to be considered as facts."

However, this is how things are done within the international legal order. As the hierarchy of legal norms is different within the EU legal order this flexibility and elasticity with regards to the application of EU Law is turned to an overriding obligation to, at any event, ensure its unequivocal, uniform and effective implementation. In this context, EU Law is accorded the status of the supreme rule of law. Thus, where an arbitral award is conceived by an EU judicial "eye" as a product of EU Law's fallacious application or circumvention, particularly with regards to its overriding public policy provisions and uncontested imperative of their direct and unconditional application, its enforceability within the EU order may very well be questioned and thereby seriously shake the foundations of investor-State Arbitration as a final and binding adjudicatory mechanism. It shall be mentioned however, that the render of an intra-EU award unenforceable by an EU national court under EU State Aid Law consideration, does not impede or affect otherwise the practical opportunities of the investor to enforce the award in other legal orders outside the EU.

I. ENFORCEMENT UNDER THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

As an intra-EU award ordering the re-installment of illegal state aid enters the recognition and enforcement stage in an EU forum under the New York Convention's auspices, the real action begins, since EU national courts have the last word on the award's recognition and enforcement and may deny it on the grounds of public policy, where enforcement of such an award would be directly in conflict with the EU mandatory provisions on prohibited State Aid under Article V (2)(b) of the New York Convention.

Admittedly, EU State Aid rules are considered as one of dogmatic pillars of the EU Competition policy and certainly one of the most fundamental aspects of what

constitutes the EU public policy. The notion encompasses those overarching concepts, principles and constellations, infringement of which would produce a manifest irregularity or a substantial injustice within the EU legal order and would seriously erode the integrity and coherence of the Union's structures. In the *Eco Swiss* case the ECJ emphatically referred to the imperative under which Member States are to observe EU public policy and ensure its application in a consistent and uniform manner. In effectuating this obligation Member States may go that far as to even deny recognition and enforcement of an award rendered manifestly in violation of the EU public policy⁷⁹. This approach can also be adopted in case of an arbitral award ordering compensation that would de facto re-implement the very economic advantage which was revoked as incompatible with EU State Aid law.

What remains to be answered is whether the Article's V (2)(b) NYC public policy ground for refusal of enforcement rule shall be interpreted as a blanket rule covering all cases concerning the revocation of illegal State aid⁸⁰, or in a *stricto sensu* manner as a rule to be invoked premised on the existence of a relevant formal declaration by the EU Commission on the aids illegality and incompatibility pursuant to Article 108 TFEU. This differentiation in the invocability and applicability of the public policy exception develops significant practical relevance since it may eventually constitute the key that will either unlock or double-lock the enforceability of the pertinent intra-EU award.

The approach adopted by the French Court of Cassation in *Cytec*, a case with strong EU Competition Law "scent", may serve as a valuable guide in answering this question. The Court concluded that recognition and enforcement may be denied when an award violates EU Competition Law, however, only in the presence of "a demonstration of a "flagrant, effective and concrete violation of the EU public policy". Applying this approach in the State Aid context, the existence of an EU Commission's decision declaring the aids incompatibility with the internal market can certainly serve as an uncontestable manifestation that the enforcement of such an award ordering the re-installment of illegal State Aid would grossly violate the fundamental provisions of EU Law on State Aid and as such, it shall be deemed as demonstrating a "flagrant, effective and concrete violation of the EU public policy". In this sense, EU public policy ground shall be activated where the enforcement of the award at stake, would entail a disregard and a manifest violation of the fundamental EU State aid rules. In the presence of a Commission's decision pursuant to Article 108 TFEU this "manifest violation" element is transformed from a relatively vague conceptual constellation to an

⁷⁹ Also case *Maria Claro* ECJ case.

⁸⁰ Ortolani P., *Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance*, *Journal of International Dispute Settlement*, Volume 6 (2015) pp.129

authoritatively confirmed legal reality. Hence, it would serve as a *prima facie* presumption from which it could be validly inferred that enforcement of the pertinent award would de facto reallocate illegal State Aid and thus it would violate Article 107 TFEU as integral part of the EU public policy .

Therefore, it shall be concluded that application of the *Eco Swiss* jurisprudence to every single case demonstrating a EU public policy dimension without any further qualification e.g. the existence of a Commission decision declaring the measures illegality, is an over-inclusive approach in conflict with the more restrictive interpretative assessment of Article V(2)(b)NYC suggested, –if not mandated- also by the pro-enforcement bias underpinning the NYC “architecture”⁸¹ 129.

Furthermore, such an open-ended and unconditioned application of the public policy constellation in variety of cases of different backgrounds would mathematically trigger the production of a vast amount of divergent interpretations on the notion’s conceptual identity, dimensions and limitations. Within such a “mosaic” of the diverging views on what eventually constitutes the EU public policy, the attainment of the consistent and uniform application of the EU public policy objective pronounced in the *Eco Swiss* as an overarching obligation of the Member States seems, at least, a really hard job to do. This uncertainty surrounding the EU public policy concept would also threaten the stability of the another fundamental NYC pillar, the duty of national courts seized to enforce, to abstain from proceeding in a review on the merits of the case at hand on their way to decide the granting or the refusal of enforcement. In the absence of a decision by the Commission on the illegality of the revoked measure, the court of enforcement may “indulge” in an evaluation of the merits in order to confirm on its own whether the measure revoked violates Article 107 TFEU, something that would run afoul to the court’s limited role only to grant or refuse enforcement.

In the light of those considerations, it shall be concluded that enforcement of an intra-EU arbitral award mandating the re-installment of illegal State Aid shall be refused on the grounds of EU public policy violation where the illegality and incompatibility of the measure at stake has been assessed and declared by the Commission in the form of a decision pursuant to Article 108 TFEU.

C. ENFORCEMENT OF AN INTRA-EU AWARD UNDER THE WASHINGTON CONVENTION (ICSID)

⁸¹ Id, pp. 129.

Within the universe of the International Centre for the Settlement of Investment Disputes (ICSID) , things are quite different for arbitral awards rendered under the Center's aegis. In the words of the ICSID ad hoc Committee in the *MINE V Republic of Guinea* case, the ICSID Convention "excludes any attack on the award in the national courts." This phrase encapsulates the ICSID's character as a self-contained and self-executing system, stemming from Articles 53 and 54 of the ICSID Convention.

Particularly Article 54 ICSID introduces an overarching obligation according to which: "Each Contracting State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". In this sense, final awards rendered under the ICSID auspices, are conceived to be binding and surrounded by a protective "cloak" which immunizes them from any scrutiny by national courts with regards to their recognition and enforcement and eliminates any defensive ground, even that of public policy violation, that could block their effectuation.

However, the recent EU Commission's decision to issue an suspension injunction in order to "freeze" the enforcement by Romania, of the *Micula* award, rendered under the ICSID auspices, relying on the circumstance that EU is not party to the ICSID and thus, not bound by the Article 54 obligation to ensure enforcement, exposed a loophole in the conceived as well-insulated self-executing ICSID structure and further revealed the intricate nature of the interplay between EU Law and international investment norms as the ICSID Convention.

Although not in violation of the ICSID Convention *stricto sensu*, this suspension injection constitutes in essence a direct mandate to the Member State to contravene ICSID and breach its international law obligations. It is questionable whether the *Kadi* approach on the normatively hierarchical precedence accorded to the core principles and structures of EU Law when confronted by irreconcilable international law obligations fulfillment of which would erode "the very foundations of the Community's legal order"⁸², could justify a blithe disregard of international law by the EU Law, and, by analogy, constitute a solid basis for obstructing ICSID awards enforceability. Under Article 27 VCLT, States are precluded from invoking provisions of their internal law, and therefore also EU Law provisions as integrally incorporated within the Member States legal orders, in order to justify failure to comply with obligations stemming from an international law instrument.

In this context, the conceptual constellation adopted by the EU, pronouncing a distinction between the EU international obligations and the international obligation of

⁸² Ortolani P., Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance, *Journal of International Dispute Settlement*, Volume 6 (2015) pp.132

the Member States, from which the argument ICSID irrelevance from an EU Law perspective stems, does not suffice to “purify” the imposition of EU Law originated obstacles to the fulfillment of international law obligations, as the enforcement of ICSID awards. As a matter of fact, the incorporation of ICSID investment arbitration as one of the possible “venues” for dispute resolution under Article 26 of the ECT, the “constitution” of energy investments that the EU brought in life, manifests how narrow and particularistic the approach adopted by the EU is, to consider itself as legally detached from the ICSID Convention. “From this point of view”, as Ortolani aptly submits, “ the ICSID Convention should be regarded as having a limited, although undeniable degree of normative power (within the EU legal order), rather not having any legal effect at all”.⁸³

But also from a more doctrinally coherent perspective, to allow an a-la-cart observance of the international law, in accordance with the EU interests would grossly undermine the status of international law, as encompassing generally accepted, overarching rules and structures of universal character, and eventually trigger the collapse of the whole architecture called “hierarchy of legal norms”. Therefore, the approach followed by the Commission to issue a suspension injunction in order to impede the enforcement of ICSID intra-EU awards, shall be considered a violation of the EU fundamental objective enshrined in Article 3(5) TFEU to respect and promote international law and further, a breach of the Union’s international obligations.⁸⁴⁸⁵

At the other side of the spectrum, the investor’s possible “avenues” ,in cases where an EU Member State resists enforcement of an ICSID award on the basis of any EU Law constellations including suspension injunctions and ECJ infringement proceedings, although limited and of untested effectiveness, are still present. One possible scenario could be the adoption of some kind of punitive measures by the World Bank against Contracting States that avoid their treaty obligations. Furthermore, the International Court of Justice (ICJ) might provide a forum for a Contracting State to bring a case on behalf of an investor against another Contracting State for the latter’s refusal to enforce an ICSID award⁸⁶.

⁸³ Id, pp. 133.

⁸⁴ Id, pp. 134.

⁸⁵ It has been also suggested, that enforcement of ICSID arbitral awards may be denied under some international law norms prescribing the interpretation of international law obligations in the light of “good faith” as an overarching principle, or even under the constellation of “abuse of rights”. It remains in the sphere of theoretical creativity as a hypothetical scenario, however, these approaches, albeit overstretching, may also be invoked as possible defences by the Member States directly, or through the authoritative “lips” of EU institutions, against the enforcement of ICSID awards ordering the payment of enormous amounts of money in damages(82 million euros in *Micula*)

⁸⁶ Limits to Enforcement of ICSID Awards Limits to Enforcement of ICSID Awards

Edward Baldwin, Mark Kantor and Michael Nolan, Journal of International Arbitration 23(1): 1–24, 2006

F. CONCLUDING REMARKS

The above analysis illustrates some of the most intinsing contours of this interface between intra-EU awards and EU State Aid Law and further exposes the real width, the intensity and the complexity of the perceived clash between international investment law and the EU Law.

As the mysteries and the peculiarities of EU State Aid regime penetrate in the field of international investment arbitration, the implications generated regarding compliance with intra-EU awards are particularly serious. As a general principle, where the obligation to compensate the “injured” investor derived from an arbitral decision and by operation of law, compliance with such an award does not amount to illegal State Aid under Article 107 TFEU as the imputability criterion is not met. However, as the exception that proves the rule, the payment of damages as compensation for the revocation of an illegal State Aid is deemed to constitute ipso facto a violation of the EU State Aid rules because it is conceived as an attempt to re-implement from the back door and de facto re-grant the revoked illegal aid and reallocate the lost economic benefit in an unauthorized, illegal and thus incompatible with the internal market manner.

These considerations have particular importance when such an intra-EU award enters the “universe” of EU Law at the enforcement stage under the NYC system. In this context, intra-EU awards enforceability shall be questioned on EU public policy grounds only at the presence of an EU Commission’s decision, declaring the illegality and incompatibility of the revoked measure. Within the ICSID “realm”, enforceability of awards rendered under its auspices, is, a principle, safeguarded. However, the Convention’s normative scope does not extend so far as to preclude non-Contracting parties, as the EU itself, not to impede or limit the enforcement of an intra-EU ICSID award where enforcement is conceived under the EU Law perspective, to constitute a violation of EU public policy. The EU Commission’s intentions, already demonstrated in the *Micula* case, to follow this “circumventing path” so as to block ICSID awards enforcement by neglecting international law obligations, directly clash with the core EU objective towards “strict observance” of international law. In this respect, EU Law seems to be suffering from an “identity crisis” with regards its position within and vis-à-vis international law. In any event, it shall be emphasized, that prohibiting compliance with ICSID awards via the issuance of a suspension injunction constitutes a gross violation of the Union’s obligations vis-à-vis international law and injects uncertainty and unpredictability in a particularly sensitive area of economic activity, crying-out for

legal security and stability. Under these circumstances, it is mathematically certain, that the EU's envisagement, to evolve itself in a considerable player in game of international investment will take a long time to find its realization.

CHAPTER 7.

THE FUTURE OF THE ENERGY CHARTER TREATY (ECT) IN THE LIGHT OF THE INTRA-EU BITS AND EU LAW INTERPLAY

The envisagement of a European Energy Union, although eventually abandoned by the architects of the European structure, provided for the necessary momentum towards the establishment of a solid protective framework to surround cross-border investments in the energy sector, the Energy Charter Treaty (ECT). As a true grandchild of the EU, the ECT was elaborated by the Commission as a multilateral, sector-specific instrument that concentrate the impetus to play the role of an universal energy constitution of EU provenance. It has been either signed, ratified or acceded to by over 50 nations and international organizations among of which are all the EU Member States, the EU itself, and other very important international energy players.

As the interaction between investment treaty law with the EU Law climaxes, the tensions it generates extends also to the area of multilateral investment protection affecting particularly the ECT as the only multilateral investment protection instrument in which the European element is so inherently embedded. Further, as the *problematique* of applicability and validity of intra-EU BITs reaches its peak, particularly in the context of infringement proceedings initiated by the Commission against Member States requesting them to terminate their intra-EU BITs as incompatible with the EU Law, a question arises as to whether the realization of such a termination scenario would leave ECT unaffected and puts the ECT's continuing applicability in the field of intra-EU investment under the microscope.

These tensions produced in the ECT area, derive from the simple reality that from an intra-EU perspective, since all EU Member States and the EU as an international organization are parties to the ECT, the Treaty could be conceived also as a mega-intra-EU BIT comprised of several BITs concluded between each and every EU Member State with each other. As a preliminary remark it shall be stressed that the Commission's almost obsessive stance against the continuing validity of intra-EU BITs within the EU legal order, leaves limited space to even speculate that the ECT while remain untouched by the Commission's "fire". After all, this would be a manifest and unacceptable contradiction of policy from an EU perspective to intensively challenge

the necessity of maintaining an intra-EU system of investment protection based on BITs on the one hand, and on the other to immune from such an “epithesis” the ECT and its applicability in intra-EU investment disputes. It remains to be seen which *modus operandi* the Commission will choose to follow in order to bring ECT in line with its “intra-EU BITs –ground zero” position. This chapter will examine the ECT’s applicability on intra-EU investment disputes and the possible “venues” –if any available- that could lead to its disarmament with regards to this special category of investment disputes.

A. THE ECT IN ITS INTRA-EU BIT DIMENSION

The *problematic* around ECT in the context of the Intra-EU BITs and EU Law battle basically arises due to the ECT’s operation between EU Member States as a mega-intra-EU BIT or, in other words, a concrete bundle of intra-EU BITs uniformly applicable in the relations between EU Member States as parts of the ECT. From the Commission’s perspective, the major concern emerging here is that even if the scenario of intra-EU BITs termination finds its realization, intra-EU investment arbitration could still be an active alternative in case of disputes arising out of investments in the energy sector and are covered *ratione materiae* and *ratione personae* from the ECT. In this respect, the ECT is conceived not only as a factor resolving inconsistencies and filling gaps caused by the potential termination of the intra-EU BITs at least in the sensitive field of energy but also a parameter which if maintained as it stands, it would keep in life some of the intra-EU BITs most disturbing features. As the Commission fears, ECT would provide for a backdoor ground for arbitral tribunals to assume jurisdiction over intra-EU energy disputes, misapply or disregard EU Law and hence it would *de facto* perpetuate the “anomaly within the internal market” that the Commission so passionately seeks to eliminate.

In the light of these considerations, it could be inferred with relative certainty that, the EU campaign towards the elimination of intra-EU BITS from the map of international investment protection will not leave ECT unaffected. The most complex part of the conundrum of ECT’s future relates to how exactly the EU institution will handle the peculiar dilemma of “having created the ECT and now having to ensure its compatibility with EU Law in relation to third countries and to deal with its continuing validity and applicability under international law also for intra-EU relations”.

.Probably the EU will seek a formula to essentially dismantle ECT, so as to isolate and discard the intra-EU element and disconnect intra-EU relations from its scope of applicability. The fact that such an approach would directly run afoul and undermine the fundamental rationale underlying the ECT i.e. the establishment of a comprehensive,

well-rounded, solid framework for the promotion and the protection of energy investments, is another story, probably a very romantic and idealistic one to be taken seriously into account by the EU institutions so deeply engrossed in their project to extinguish intra-EU investment protection under BITs from the EU world.

In any case, provided for the ECT's nature as a public international law instrument, any attempt to achieve such a carve-out solution as an amendment in the Treaty's scope of application shall be surrounded with some kind of formality and be made in accordance with the applicable international rules in order to produce legal effects. A mere declaration even from the ECJ's authoritative lips on the incompatibility of the Treaty's intra-EU dimension with the EU Law would not be binding on arbitral tribunals established under the ECT auspices and a fortiori it would by no means suffice to trigger the public policy exception in order to block the enforcement of an intra-EU award made under the ECT. Of course, awards rendered under the ICSID aegis continue to be shield from any public policy related scrutiny. However, such a carve-out in the ECT's scope of applicability made in the form of a binding, from a treaty law point of view, amendment would eventually prevent also ICSID tribunals to blithely ignore it. Dimopoulos suggests that the resolution of the conundrum regarding the applicability of ECT could be derived from an assumption of EU Law prevalence vis-à-vis ECT as *lex specialis*, applicable in spite of issues of temporality, given that the determination of the temporal order of ECT and EU Law, as legal instruments both operating in the investment protection area is particularly complex to allow eventually the application of the *lex posterior* interpretative rule to resolve any conflict. However, provided for the ECT's sector-specific nature, and the absence of Member States explicit or even implicit declaration of their genuine intention to prioritize EU Law over the specialized and comprehensive ECT framework and allow its inapplicability in their inter se relations, it is doubtful whether this approach has the necessary doctrinal foundations but also the conceptual "impetus" to effectively resolve the issue of ECT applicability⁸⁷.

B. DOES THE ECT STILL HAVE BINDING EFFECT WITH REGARDS THE EU MEMBER STATES inter se RELATIONS?

⁸⁷ It has been suggested also, that Member States, by entering the EU quasi-constitutional structure, have implicitly accepted the subordination of inter se international agreements by virtue of the EU Law supremacy, as part of the EU *acquis*. However, this approach seems an over-stretched one. If the renouncement of the specialized nature and the extensive width of protection provided from inter se IIA's in a substantive but also in a procedural level and the following imposition of significant limitations in the scope of protection of individuals was the real intention of the Member States when entering the EU, they would have somehow externalized their will regarding such a strong disruption of the previously existed status quo.)

Any prophesy regarding the ECT's future shall take into consideration the Treaty's nature as a Mixed Agreement. This characterization refers not only to the fact that both the EU and its Member States are contracting parties of the ECT but it also to the mixed allocation of competences in the fields covered by the Treaty. Under this unique competence constellation, the EU enjoys exclusive competence in energy trade aspects of the ECT. Competence on issues relating to investment promotion and protection was firstly allocated to the Member States. In the advent of Lisbon Treaty the balance of competences slightly changed as foreign direct investment was located under the umbrella of EU's exclusive competence. Hence, extra-EU investment covered by the ECT shall be considered as encompassed by the Union's exclusive competence in the FDI area. However, ECT remains a Mixed Agreement insofar the Lisbon competence shift did not affect the intra-EU investment which remains an area of shared competences and from an ECT perspective continues to fall under the Member States powers.

The legal character of the ECT as a mixed agreement under EU Law does not undermine or distort its comprehensive legally binding effect from the perspective of international law *erga omnes*, i.e. not only between EU and its Member States vis-a-vis third States but also with regards to the inter se relationships of the EU Member States.⁸⁸

With regards to the Member States inter se relations, any attempt to disconnect them from the ECT's scope of application shall be made in the light of the assumption that when acting within the spectrum of a mixed agreement, Member States are proceeding as autonomous subjects of international law and they are entering in international law relations creating rights and obligations also in an inter se level⁸⁹. Any adjustment or modification to the status quo existing between them -in this context, the elimination of the intra-EU dimension of the ECT- shall be made in the form of a public international law treaty regulating exactly the desired alteration in the regime governing their inter se relations. However, it is rather questionable whether the ECT framework leaves any space for the conclusion of such inter se carve-out agreements between EU Member States as an attempt to disconnect intra-EU investment from its ambit.

One "venue" that could eventually allow a modification in the ECT's legally binding effect in a Member States inter se level, in a "disconnection clause". Under interesting international law constellation endorsed also in Article 30(2) VCLT, Member States could deviate from ECT's scope, escape in a partial or in an absolute manner the

⁸⁸ Tietje C., The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. Member States, Heft 78 Institute of Economic Law, Transnational Economic Law Research Center (TELRC) (2008).

⁸⁹ Id, pp. 27.

regulation of their relations by the Treaty and instead, apply EU law in their inter se involvements to the extent it covers the particular subject matter.

However, the ECT framework does not endorse an “exit” from its regulatory scope under a “disconnection clause”. This clearly intended omission per se reflects the overarching desideratum underpinning the establishment of the ECT i.e. its comprehensively binding effect. The fact that the ECT constitutes an EU architecture emphasizes the imperative of preserving the ECT’s intra-EU dimension in order to ensure its integrity as a legal instrument. Furthermore, Article 16 ECT essentially prohibits the conclusion of such inter se agreements that eventually, affect adversely the position of the investor as established under the ECT by entailing a de facto and de jure deprivation of substantive and procedural rights enjoyed under the ECT.

The most illustrative example of a core procedural right, the provision of which by the ECT locates the investor or the investment in a significantly more favorable position than the EU Law could ever bring him, is the opportunity to submit an investment dispute to international arbitration under Article 26 ECT. As a matter of fact, by virtue of the ECT’s character as the “holy bible” of energy investment disputes, particularly where an EU element is involved, a considerable number of intra-EU arbitrations have been taken place under the Treaty’s aegis including *Plama v Bulgaria*, *AES v Hungary*, *Electrabel S.A. v Hungary*, and the prominent cases of *Vattenfall v Germany*.

The only provision within the ECT that could be conceived as providing for a partial disconnection clause is Article 26(3)(b)(ii)⁹⁰. The Communities, in the form of a written Statement have taken advantage of this “escape clause” in order to exclude EU nationals from submitting disputes against other Member States in international arbitration. Could this Statement be considered binding also for the EU Member States and thus entail an implicit modification of the Member States inter se relations regarding the ECT binding effect? It is seriously questionable whether this question could be answered in the affirmative since it is generally accepted that within the framework of a mixed agreement, the Member States operate independently from the EU, as autonomous subjects of international law.

The only basis upon which the argument of implied modification could be examined is Article 41 VCLT stipulating that in principio, any modifications attempted in the regulatory “corpus” of a public international law treaty shall be governed by the

⁹⁰ (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

provisions of the treaty concerned. Hence, modification is, as a matter of principle, recognized and allowed as a scenario, however not unconditionally, but only to the extent it does not “affect the enjoyment by the other parties of their rights under the (modified-to-be) treaty or the performance of their obligations or relate to a provision derogation which is incompatible with the effective execution of the object and purpose of the treaty as a whole as stipulated by Article 41(1)VCLT”.⁹¹.

Seen through this prism of interpretation, Article 41 VCLT calls into action the only relevant ECT provision, Article 16 ECT and its corresponding prerequisites for such an inter se modification precluding the ECTs replacement when ipso facto, negative implication could be imposed to the investor. This provision incorporates a vulnerability safeguard to ensure a minimum standard of substantive and procedural protection offered to an investor under the ECT that is immune from any inter se modification that may occur. In this sense, permitting an inter se modification that would severely affect this minimum of protection to the investor’s detriment, would grossly injure the ECT’s objective and purposive foundations and represent a de facto “mutilation” of the material and procedural rights and guarantees to the investor’s disposal. The intensity and irreversibility of this deprivation of rights can be appreciated in its wholeness in the context of investment arbitration provided to the investor under Article 26 ECT, which as an alternative is completely absent within the EU investment protection framework as incompatible with the principle of mutual trust and the ECJ’s interpretative monopoly. To deny resort to such as specialized judicial forum as the investor-State arbitration is and to subject the investor to the jurisdiction of EU national courts, constitutes a serious deterioration of his position. As aptly submitted by the arbitral tribunal in the *Plama v Bulgaria* case:

“for all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. The ECT has been described, together with NAFTA, as “the major multilateral treaty pioneering the extensive use of legal methods characteristic of the fledging regulation of the global economy”, of which “perhaps the most important aspect of the ECT’s investment regime is the provision for compulsory arbitration against governments at the option of foreign investors ...”; and these same distinguished commentators concluded: “With a paradigm shift away from mere protection by the home state of investors and traders to the legal architecture of a liberal global economy, goes a coordinated use of trade and investment law methods to achieve the same objective: a global level playing field for activities in competitive markets”. By any standards, Article 26 is a very important feature of the ECT which is

⁹¹ Burgerstaller, pp. 209.

itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.”

E. CONCLUDING REMARKS

The conceptual weight of the above-mentioned words of the *Plama* tribunal, authoritatively and so comprehensively encapsulating the ECT’s paramountcy in the hall of international investment norms, reveal the legal necessity to preserve the individual rights dimension of the ECT unaffected by any inter se modifications that would deteriorate the investor’s position. To the extent such a modification would allow ECT protective framework to be substituted by the corresponding –and of questionable efficacy– EU Law investment protection provisions, and more importantly would entail the direct and irreconcilable deprivation of the investor’s ECT fundamental procedural right to resort to investor- State arbitration, it constitutes an direct attack to the ECT’s beating heart as a Treaty with an individual rights dimension, and as such it shall not be permitted.

In conclusion, the applicability of ECT in intra-EU investor-State disputes is by no means undermined or otherwise affected by the EU Law. EU nationals are able to bring claims under the ECT against other Member States

CHAPTER 8.

CONCLUSION

The above analysis has shed significant light to the interplay between intra-EU BIT and EU Law, as well as to the fascinating implication of this interface. The *problematic* surrounding their “co-habitation” as legal norms, seems nowadays, more heated than ever. Certainly, the scenario set forth the EU Commission pressing the Member States to rescind their mutual obligations by terminating their intra-EU BITs, does not provide for a sophisticated legal solution to the “dilemma” of preserving or extinguishing them from the map inter-EU investment law norms. Rather, it disregards the tantamount importance of intra-EU BITs in safeguarding comprehensively and effectively the investor’s rights and the deep “deficit” of investment protection that will be certainly caused with the EU by their potential disappearance.

In searching for the “perfect equilibrium” between those competing legal norms, there are some possible solutions that potentially could provide for an effective solution to this legal “conundrum” surrounding their “co-habitation” in the intra-EU investment landscape. The introduction of an MFN obligation to the Member States, in the form of a solid principle within the EU legal order, and most importantly, the insert of MFN clauses to existing intra-EU BITs, would certainly facilitate the accommodation of intra-EU BIT’s within the EU legal order. These clauses would ensure the extension of all substantive and procedural standards contained in an intra-EU BIT automatically also to investors from other Member States, by reference to the highest standards available. Under this solution, the argument of the discriminatory effect of intra-EU BITs, will have no reason to further develop.

Another “path” that could be followed in order to adapt intra-EU BITs within the EU Legal order without jeopardizing the advantages stemming from their operation, would be the adoption of European clauses within the problematic intra-EU BITs. Under this solution, these elements that in the eyes of the EU institution constitute incompatibilities with the EU would be more harmoniously incorporated within the EU legal order. Special reference, under this solution, may be made to European public policy considerations which constitute a source of legal uncertainty, particularly in the

context of intra-EU arbitral awards enforceability. In this sense, these clauses, may well serve as authoritative guides for the right, uniform and effective application of EU Law, and possibly, ensure jurisprudential consistency with the EU Legal order.

With these considerations in mind, and having in mind the pending infringement proceedings on the termination of some intra-EU BITs, it is obvious, that an attempt to reconcile these presumably clashing legal regimes, requires something more than aspirational suggestions. It requires the resolution of this conflict to be elevated into the “ultimate desideratum” of both Member States and the EU institutions. It remains to be seen, whether intra-EU BITs will continue their “lives” within the EU legal order, which, almost obsessively pursues their “extinction”.

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